



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

MATSU OHIO, INC.,

Respondent.

OSHRC Docket No. 14-0403

APPEARANCES:

For the Complainant:

Linda M. Hastings, Esq.
U.S. Department of Labor
Cleveland, Ohio

For the Respondent:

John J. Coleman, III, Esq.
Ronald W. Flowers, Jr., Esq.
Burr & Forman LLP
Birmingham, Alabama

BEFORE: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

The Respondent, Matsu Ohio, Inc. (Matsu), is an automotive supplier that manufactures stamped metal parts at its plant in Edgerton, Ohio. Matsu operates ten partial revolution mechanical power presses at the plant. (T. 7, 187).

On January 9, 2014, a compliance safety and health officer (CO) for the Occupational Safety and Health Administration (OSHA) conducted a programmed inspection of the plant in furtherance of its national emphasis program to prevent amputation injuries. (T. 6, 17-18). As a result of the inspection, on February 24, 2014, the Secretary issued a “Citation and Notification of Penalty” that alleged one serious citation (citation 1) with eight citation items, and one “other than serious” citation (citation 2) with three citation items. The citation items alleged violations of the control of hazardous energy standard (known as “lockout/tagout” or LOTO), 29 C.F.R. § 1910.147, and violations of the mechanical power press standard, 29 C.F.R. § 1910.217. Matsu timely contested the citations and proposed penalties, bringing the matter before the Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act (Act). 29 U.S.C. § 659(c). The matter was assigned to the undersigned administrative law judge, who conducted an evidentiary hearing in Toledo, Ohio, on February 26 & 27, 2015. Post-hearing briefing was completed on May 29, 2015.

The parties resolved three citation items before the hearing through a partial settlement agreement, so those citation items are not addressed here. (T. 13, Ex. J-1). Also, at the outset of the hearing the Secretary withdrew item 6a of citation 1 (T. 13), so that item is formally vacated herein. The remaining seven citation items alleged five violations of the LOTO standard and two violations of the mechanical power press standard.

The dispositive issues for decision are:

- Did the Secretary establish that the LOTO standard (§ 1910.147) was applicable by proving by a preponderance of the evidence that an unexpected energization or start up, or release of stored energy, of the mechanical power presses could cause injury to employees engaged in the cited service and maintenance activities? (Citation 1, items 2, 3, 4a, 4b)
- Did the Secretary establish by a preponderance of the evidence that Matsu knew or in the exercise of reasonable diligence could have known that two

lockout devices did not indicate the identity of the employee applying the device as required by § 1910.147(c)(5)(ii)(D) of the LOTO standard? (Citation 2, item 2).

- Does § 1910.217(d)(9)(i) of the mechanical power press standard require that the die setting procedure for mechanical power presses specify procedures for the control of hazardous energy that meet the specific requirements of the LOTO standard? (Citation 1, item 6b)
- Did the Secretary prove by a preponderance of the evidence that the means of selecting the mode of operation of two mechanical power presses was not capable of being secured in a fixed position and supervised by the employer as required by § 1910.217(b)(7)(iii) of the mechanical power press standard? (Citation 2, item 3).

As set forth below, all these questions are answered in the negative, and thus all the remaining citation items are vacated.

FINDINGS OF FACT

The following facts were established by at least a preponderance of the evidence:

1. At all relevant times, Matsu employed employees at its plant in Edgerton, Ohio, where it manufactures motor vehicle supplies and parts. Matsu is engaged in a business that affects interstate commerce. (Answer, ¶¶ II & III).

Five Relevant Mechanical Power Presses: Niagara Transfer, Niagara 400-25, Minster 400-36, Minster SE4-800, and USI Clearing 1000

2. Matsu operates ten partial revolution mechanical power presses¹ at its plant, five of which were as follows: (i) a Niagara transfer press, (ii) a Niagara 400-25 straight side press, (iii) a Minster 400-36 straight side press, (iv) a Minster SE4-800 progressive press, and (v) a USI

¹ Matsu's mechanical power presses meet the following definition of "press" set forth in 29 C.F.R. § 1910.211(d)(46) (which defines the term for purposes of § 1910.217):

Press means a mechanically powered machine that shears, punches, forms or assembles metal or other material by means of cutting, shaping, or combination dies attached to slides. A press consists of a stationary bed or anvil, and a slide (or slides) having a controlled reciprocating motion toward and away from the bed surface, the slide being guided in a definite path by the frame of the press.

Clearing 1000 press. (T. 7). (Findings of Fact ¶¶ 3-16 *infra* address matters common to these five presses, and subsequent Findings of Fact relate to the specific press indicated.)

3. Each of the five presses have a “part revolution clutch” as that term is defined in 29 C.F.R. § 1910.211(d)(6).² Part revolution clutches can be disengaged at any point before the crankshaft has completed a full revolution and before the press slide has completed a full stroke. The part revolution clutches operate in the manner required by 29 C.F.R. § 1910.217(b)(7)(i)-(iii),³ so that the clutch releases and the brake is applied when the external clutch engaging means is removed, deactivated, or de-energized.

4. The part revolution clutches in the Matsu presses are engaged by air pressure that is regulated by a dual air valve that is known as a “Ross” valve. (T. 65-67, 194). The Matsu

² The part revolution clutches on the Matsu presses meet the following definitions of “clutch” and “part revolution clutch” set forth in § 1910.211(d)(4) & (6):

(4) *Clutch* means the coupling mechanism used on a mechanical power press to couple the flywheel to the crankshaft, either directly or through a gear train.

....

(6) *Part revolution clutch* means a type of clutch that can be disengaged at any point before the crankshaft has completed a full revolution and the press slide a full stroke.

³ Section 1910.217(b)(7)(i)-(iii) provides:

(7) *Machines using part revolution clutches.* (i) The clutch shall release and the brake shall be applied when the external clutch engaging means is removed, deactivated, or deenergized.

(ii) A red color stop control shall be provided with the clutch/brake control system. Momentary operation of the stop control shall immediately deactivate the clutch and apply the brake. The stop control shall override any other control, and reactivation of the clutch shall require use of the operating (tripping) means which has been selected.

(iii) A means of selecting Off, "Inch," Single Stroke, and Continuous (when the continuous function is furnished) shall be supplied with the clutch/brake control to select type of operation of the press. Fixing of selection shall be by means capable of supervision by the employer.

presses conform to the requirements of 29 C.F.R. § 1910.217(c)(5)(iii),⁴ so that if the Ross valve fails, further operation is inhibited, and there is no significant increase in the normal stopping time. If a Ross valve fails, it “fails shut” and exhausts the air energy to the exhaust port, and cuts electrical power to the control circuit. (T. 194, 280).

5. Each of the five presses has a red color stop control (e-stop) that is provided with the clutch/brake control system as required by § 1910.217(b)(7)(ii), quoted *supra* at footnote 3.⁵ The momentary operation of the e-stop immediately deactivates the clutch and applies the brake. The e-stop overrides any other control, and re-actuation of the clutch requires use of the operating means that has been selected.

6. The e-stop buttons on the presses are “control circuit type devices” and thus do not meet the definition of “energy isolating device” in 29 C.F.R. § 1910.147(b).⁶ (T. 38-39). When a press’s e-stop is engaged, it disconnects (or interrupts) the circuit to the control circuit for the main motor, so that the power from a press’s main disconnect stops at the press’s safety relay. (T. 265, 269, 273-76). Even though the e-stop button is not an “energy isolating device,” all the

⁴ Paragraph 1910.217(c)(5)(iii) provides in relevant part as follows:

The control of air clutch machines shall be designed to prevent a significant increase in the normal stopping time due to a failure within the operating valve mechanism, and to inhibit further operation if such failure does occur, where a part revolution clutch is employed.

⁵ The stop controls (e-stops) meet the following definition set forth in § 1910.211(d)(52): “*Stop control* means an operator control designed to immediately deactivate the clutch control and activate the brake to stop slide motion.”

⁶ Section 1910.147(b) contains the following definition (boldface supplied):

Energy isolating device. A mechanical device that physically prevents the transmission or release of energy, including but not limited to the following: A manually operated electrical circuit breaker; a disconnect switch; a manually operated switch by which the conductors of a circuit can be disconnected from all ungrounded supply conductors, and, in addition, no pole can be operated independently; a line valve; a block; and any similar device used to block or isolate energy. **Push buttons, selector switches and other control circuit type devices are not energy isolating devices.**

e-stop buttons on the Matsu presses are “capable of being locked out” as that term is defined in 29 C.F.R. § 1910.147(b).⁷

7. All the presses except the Minster SE4-800 have presence sensing point of operation devices known as “light curtains” that meet the definition of “presence sensing device” in 29 C.F.R. § 1910.211(d)(12).⁸ The light curtains conformed to the requirements of 29 C.F.R. § 1910.217(c)(3)(iii) by preventing or stopping normal stroking of the press if the operator's hands or other body part are inadvertently placed in the point of operation.⁹ The light curtains on

⁷ Section 1910.147(b) contains the following definition:

Capable of being locked out. An energy isolating device is capable of being locked out if it has a hasp or other means of attachment to which, or through which, a lock can be affixed, or it has a locking mechanism built into it. Other energy isolating devices are capable of being locked out, if lockout can be achieved without the need to dismantle, rebuild, or replace the energy isolating device or permanently alter its energy control capability.

⁸ Paragraphs 1910.211(d)(11) & (12) define the terms “device” and “presence sensing device” as those terms are used in § 1910.217 as follows:

(11) *Device* means a press control or attachment that:

(i) Restrains the operator from inadvertently reaching into the point of operation, or

(ii) Prevents normal press operation if the operator's hands are inadvertently within the point of operation, or

(iii) Automatically withdraws the operator's hands if the operator's hands are inadvertently within the point of operation as the dies close, or

(iv) Prevents the initiation of a stroke, or stops of stroke in progress, when there is an intrusion through the sensing field by any part of the operator's body or by any other object.

(12) *Presence sensing device* means a device designed, constructed and arranged to create a sensing field or area that signals the clutch/brake control to deactivate the clutch and activate the brake of the press when any part of the operator's body or a hand tool is within such field or area.

⁹ Section 1910.217(c)(3)(iii) provides:

(iii) A presence sensing point of operation device shall protect the operator [by preventing and/or stopping normal stroking of the press if the operator's hands are inadvertently placed in the point of operation], and shall be interlocked into the control circuit to prevent or stop slide motion if the operator's hand or other part of his body is within the sensing field of the device during the downstroke of the press slide.

(footnote 9 continued next page)

all the presses conformed with 1910.217(c)(3)(iii) by being interlocked into the control circuit to prevent or stop slide motion if the operator's hand or other part of his body is within the sensing field of the presence sensing device during the down-stroke of the press slide. The light curtains are constructed so that a failure is indicated by the system and a failure within the system does not prevent the normal stopping action from being applied to the press when required, but does prevent the initiation of a successive stroke until the failure is corrected, as required by 29 C.F.R. § 1910.217(c)(3)(iii)(c).¹⁰ (T. 200). The light curtains are “control circuit type devices” and thus are not an “energy isolating device” as that term is defined in 29 C.F.R. § 1910.147(b) (see footnote 6 *supra*).

8. All five presses conformed to the “electrical” design and construction requirements set forth in 29 C.F.R. § 1910.217(b)(8).¹¹ The safety relays and the contacts in the control

(continuation of footnote 9)

The term “point of operation” as used in § 1910.217(c)(3)(iii) is defined in § 1910.211(d)(45): “*Point of operation* means the area of the press where material is actually positioned and work is being performed during any process such as shearing, punching, forming, or assembling.”

¹⁰ Section 1910.217(c)(3)(iii)(c) provides as follows:

The [presence sensing point of operation] device shall be constructed so that a failure within the system does not prevent the normal stopping action from being applied to the press when required, but does prevent the initiation of a successive stroke until the failure is corrected. The failure shall be indicated by the system.

¹¹ Section 1910.217(b)(8) provides:

(8) *Electrical*. (i) A main power disconnect switch capable of being locked only in the Off position shall be provided with every power press control system.

(ii) The motor start button shall be protected against accidental operation.

(iii) All mechanical power press controls shall incorporate a type of drive motor starter that will disconnect the drive motor from the power source in event of control voltage or power source failure, and require operation of the motor start button to restart the motor when voltage conditions are restored to normal.

(iv) All a.c. control circuits and solenoid valve coils shall be powered by not more than a nominal 120-volt a.c. supply obtained from a transformer with an isolated secondary. Higher voltages that may be necessary for

circuitry of the presses can be both mechanical and electrical, and they have a lifespan (although the record is devoid of evidence of how long-lived the relays and contacts are, or of any recommended frequency for replacement). (T. 277-78).

9. All five presses conformed to the “control reliability” and “brake system monitoring” provisions of 29 C.F.R. § 1910.217(b)(13) & (14).¹² (T. 297).

operation of machine or control mechanisms shall be isolated from any control mechanism handled by the operator, but motor starters with integral Start-Stop buttons may utilize line voltage control. All d.c. control circuits shall be powered by not more than a nominal 240-volt d.c. supply isolated from any higher voltages.

(v) All clutch/brake control electrical circuits shall be protected against the possibility of an accidental ground in the control circuit causing false operation of the press.

(vi) Electrical clutch/brake control circuits shall incorporate features to minimize the possibility of an unintended stroke in the event of the failure of a control component to function properly, including relays, limit switches, and static output circuits.

¹² Section 1910.217(b)(13) & (14) provide:

(13) *Control reliability.* When required by paragraph (c)(5) of this section, the control system shall be constructed so that a failure within the system does not prevent the normal stopping action from being applied to the press when required, but does prevent initiation of a successive stroke until the failure is corrected. The failure shall be detectable by a simple test, or indicated by the control system. This requirement does not apply to those elements of the control system which have no effect on the protection against point of operation injuries.

(14) *Brake system monitoring.* When required by paragraph (c)(5) of this section, the brake monitor shall meet the following requirements:

(i) Be so constructed as to automatically prevent the activation of a successive stroke if the stopping time or braking distance deteriorates to a point where the safety distance being utilized does not meet the requirements set forth in paragraph (c)(3)(iii)(e) or (c)(3)(vii)(c) of this section. The brake monitor used with the Type B gate or movable barrier device shall be installed in a manner to detect slide top-stop overrun beyond the normal limit reasonably established by the employer.

(ii) Be installed on a press such that it indicates when the performance of the braking system has deteriorated to the extent described in paragraph (b)(14)(i) of this section; and

(iii) Be constructed and installed in a manner to monitor brake system performance on each stroke.

The term “control system” as used in § 1910.217(b)(13) “means sensors, manual input and mode selection elements, interlocking and decision-making circuitry, and output elements to the press

10. Unlike hydraulic presses whose rams can drift if there is a leak or a failure in the hydraulic system (T. 282, 296), none of the Matsu mechanical power presses can store any potential gravitational energy in the rams.¹³ This is because there is a counterbalance pressure that holds or assists the ram in the “up” position, and when the ram is up and the clutch is in a braked position, the gears have full pressure on them and are in a locked position that prevents any drifting. (T. 198, 201, 204-05, 210, 213, 216, 280, 282, 285-86, 288, 290-93, 296-97).

11. Matsu’s overall LOTO program is set forth in Exhibit C-1. (T. 22). Matsu does not use its LOTO procedure when setting up or changing dies.¹⁴ (T. 137). The process of setting up or changing a die on the Matsu presses is done in order to prepare the press to perform its normal production operations, and is not itself part of normal production operations.

12. The job titles of the Matsu employees who set up the dies on the presses are the “press operators” and the “die setters.”¹⁵ (T. 295). The only task that the die setters do that the

operating mechanism.” § 1910.211(d)(59). The term “brake monitor” as used in § 1910.217(b)(14) “means a sensor designed, constructed, and arranged to monitor the effectiveness of the press braking system.” § 1910.211(d)(60). The term “brake” “means the mechanism used on a mechanical power press to stop and/or hold the crankshaft, either directly or through a gear train, when the clutch is disengaged.” § 1910.211(d)(2).

¹³ The rams on all the presses meet the following definition of “slide” set forth in 29 C.F.R. § 1910.211(d)(51): “*Slide* means the main reciprocating press member. A slide is also called a ram, plunger, or platen.”

¹⁴ Section 1910.211(d)(18) defines the term “die”: “*Die* means the tooling used in a press for cutting or forming material. An upper and a lower die make a complete set.”

¹⁵ The Matsu employees who are identified as die setters meet the definition of “die setter” set forth in § 1910.211(d)(21): “*Die setter* means an individual who places or removes dies in or from mechanical power presses, and who, as a part of his duties, makes the necessary adjustments to cause the tooling to function properly and safely.”

operators do not do is to physically remove the old die from the bolster¹⁶ and install a new die in its place, which in some instances is done by crane or by a forklift. (T. 295-96). Maintenance employees are not involved in changing the dies.

13. The LOTO training that Matsu provides to its press operators and its die setters is designed for “affected employees” and not “authorized employees” as those terms are defined in 29 C.F.R. § 1910.147(b) of the LOTO standard. (T. 121). The only Matsu employees who perform LOTO operations on Matsu presses, and thus whom Matsu trains as “authorized employees,” are the maintenance employees. (T. 121-23, 137).

14. As part of the die changing on all of Matsu’s presses, every employee who enters the light curtain must first apply her lock to the engaged e-stop. (T. 195, 260, 263, 286-87). Employees who do not enter the light curtains do not apply their individual locks to the e-stops because those employees are not regarded to be exposed to any hazard. (T. 260-61). If more than one employee has to penetrate the light curtain during die setting and set up operations on the Matsu presses, each such employee must affix his or her individual lock to the press’s e-stop and maintain possession of that key. (T. 198). If an employee who had penetrated the light curtain had failed to engage and lock out the e-stop, and another employee then attempted to reset the light curtain, the light curtain could not reset and the press would remain inoperative. (T. 197-98).

15. The die setting procedure for the all the transfer presses at Matsu is set forth at Exhibit C-8.¹⁷ (T. 26-27). The die-setting procedure does not contain instructions for locking out the equipment or instructions on whether to install any guarding for a particular die. (T. 59).

¹⁶ The bolster meets the following definition set forth in § 1910.211(d)(3): “*Bolster plate* means the plate attached to the top of the bed of the press having drilled holes or T-slots for attaching the lower die or die shoe.”

16. The die setting procedure for all the straight side presses at Matsu is at Exhibit C-7. (T. 26-27). The die-setting procedure does not contain instructions for locking out the equipment or instructions on whether to install any guarding for a particular die. (T. 59).

Niagara Transfer Press

17. Photographs at Exhibits C-11 and C-12 depict the Niagara transfer press. The photo at Exhibit C-13 depicts an employee's lock that has been applied to the press's e-stop button, which has been engaged. (T. 30-31). The press has two light curtains that conform to the design and operational requirements of 29 C.F.R. § 1910.217 described *supra* at ¶ 7. (T. 197).

18. The machine specific LOTO procedure for the Niagara transfer press is set forth at Exhibit C-2. (T. 22-23).

19. In changing the die on the Niagara transfer press, energy is required to complete the actions of lowering the ram, releasing the clamps on the bolsters, releasing the clamps on the upper die chute, and rolling the bolster out of the die space. (T. 195).

20. Part of the set-up procedure for the Niagara transfer press requires either the press operator or the die setter to attach a feed tube from a "nut feeder" onto a "nut driver." This is the activity that the employee depicted in the photograph at Exhibit C-11 is doing. This activity is done in order to prepare the press to perform its normal production operations, and is not itself part of normal production operations. Power to the press during the attachment of the nut feeder is needed for the safety circuit to power the light curtains. (T. 195-96, 227, 255).

¹⁷ The procedure for die setting in Exhibit C-8 describes "die setting" as that term is defined in § 1910.211(d)(22) as follows: "*Die setting* means the process of placing or removing dies in or from a mechanical power press, and the process of adjusting the dies, other tooling and safeguarding means to cause them to function properly and safely."

21. During die setting and other set up operations for the Niagara transfer press, including attaching the nut feeder, the e-stop is engaged and locked out, and employees unavoidably penetrate the press's two light curtains. (T. 196-97).

22. When the e-stop is engaged and locked, the press cannot cycle and the ram cannot move or drift. (T. 198, 280). The Niagara Transfer press has dual redundancy e-stops that prevent the ram from moving when no energy is going to the clutch, and which makes it impossible for energy to transfer from the flywheel to the gear mechanisms. (T. 198).

23. The Niagara transfer press has dual safety relays, both of which are controlled by the other, so that if each safety relay on the press did not get the same exact timing of information, it will not allow the control circuit to open up. (T. 281). So, if a safety relay failed with the either the e-stop locked or a light curtain having been broken, the press could not engage. (T. 281).

24. When a light curtain is penetrated, no energy is transmitted to the clutch. (T. 198, 279-80). The light curtains are designed such that they send a signal to the safety relays in order to pass, so that if a light curtain fails, the press will stop. (T. 200).

25. It is not possible for electrical energy or pneumatic energy to get to the ram when either the e-stop is locked or the light curtain has been penetrated, so the press cannot cycle and the ram cannot move or drift. (T. 200).

26. When the e-stop is locked or the light curtain is penetrated, it is not possible for air to get through the Ross valve to the clutch, and it is not possible for electrical energy to get through the Ross valve to the clutch, so the press cannot cycle and the ram cannot move or drift. This is so even if the Ross valve were to fail. (T. 198, 279-80). If the Ross valve failed, it would fail in the off position and the ram would not move. (T. 199).

27. The die setting procedure and the other set-up activities (including attaching the nut feeder) for the Niagara Transfer press, in which operators and die setters lock-out the e-stop and break the light curtain, do not expose any employees to possible injury from any unexpected energization or startup of the press, or release of hazardous energy, and this is so even if the light curtain, or the Ross valve, or the safety relay, were to fail, whether individually or collectively. (T. 279-82, 287).

Niagara 400-25 Straight Side Press

28. The photograph at Exhibit C-14 depicts the Niagara 400-25 straight side press. (T. 31). This press has two light curtains that conform to the design and operational requirements of 29 C.F.R. § 1910.217 described *supra* at ¶ 7. (T. 79, 202).

29. The machine specific LOTO procedure for the Niagara 400-25 press is at Exhibit C-3. (T. 23-24).

30. From time to time, the operator of the Niagara 400-25 press must change two date stamps on the press. (T. 227). The procedure for the operator to do so is to engage and lock out the e-stop and maintain possession of the key, stand on a stool that causes the operator to penetrate the press's light curtain, and then put her hands in the die to manually change the date stamps. The entire process of changing the date stamps takes about five minutes, and the operator's hands are in the die for about 60-90 seconds of that time. Matsu does not require its operators to utilize LOTO procedures when changing the date stamp on the Niagara 400-25. (T. 135-36, 204-05). While changing the date stamps, the safety circuits to the press remain powered so that the light curtains will be powered. (T. 254-55).

31. While changing the date stamp on the Niagara 400-25 with the e-stop locked out and the operator having penetrated the light curtains, it is not possible for the ram to move or

drift. If the light curtain failed, the press could not run at all. Even if the operator failed to lock the e-stop, the ram could not operate after the operator had penetrated the light curtain, and another employee would not be able to reset the light curtain while the operator was standing in it. (T. 205-06).

32. There is no hazard to an employee who is in the light curtain to change the date stamp. It is not possible for energy to get to the press, so the press cannot cycle and the ram cannot move or drift with the employee in the light curtain. (T. 290).

33. It is not possible for electrical energy or pneumatic energy to get to the ram of the Niagara 400-25 press when the e-stop is locked or when an employee is in the light curtain. (T. 200, 283). When the e-stop is locked or when the light curtain is broken, there is nothing that could cause energy within the press to engage the clutch so that the press cycled or the ram drifted. (T. 282).

34. If the Ross valve on the Niagara 400-25 press failed, the press would stop and could not restart. (T. 283). If a safety relay on the Niagara 400-25 failed with the either the e-stop locked or a light curtain having been broken, the press would stop. (T. 283).

35. The activities of setting the die and changing the date stamps on the Niagara 400-25, in which operators and die setters lock-out the e-stop and penetrate the light curtain, do not expose any employees to possible injury from any unexpected energization or startup of the press, or release of hazardous energy, and this is so even if the light curtain, or the Ross valve, or the safety relay, were to fail, whether individually or collectively. (T. 279-82, 287).

36. The photograph at Exhibit C-20 depicts the selector switch on the Niagara 400-25 press by which the mode of operation (off, inch, single, continuous) is selected. (T. 35-36). This switch meets the definition of “stroking selector” set forth in 29 C.F.R. § 1910.211(d)(54).¹⁸

37. The CO was not familiar with Matsu’s procedures for changing the mode of operation on its presses (T. 165), but she recalled that Matsu had provided her with a copy of its written procedure. (T. 165). That written procedure was not offered in evidence. There is no substantial evidence presented to support a finding that the fixing of the selection on the stroking selector on the Niagara 400-25 was not “by means capable of supervision by the employer” as required by 29 C.F.R. § 1910.217(b)(7)(iii), quoted *supra* at footnote 3.

Minster 400-36 Straight Side Press

38. The photograph at Exhibit C-15 depicts the Minster 400-36 straight side press. (T. 32, 81, 139, 206). The Minster 400-36 press is “practically identical” to the Niagara 400-25

¹⁸ Section 1910.211(d)(54) provides: “*Stroking selector* means the part of the clutch/brake control that determines the type of stroking when the operating means is actuated. The stroking selector generally includes positions for ‘Off’ (Clutch Control), ‘Inch,’ ‘Single Stroke,’ and ‘Continuous’ (when Continuous is furnished).” The stroking selector for the press selected the modes “inch,” “single stroke,” and “continuous” as those terms are defined in § 1910.211(d) as follows (T. 164-65, 216):

(9) *Continuous* means uninterrupted multiple strokes of the slide without intervening stops (or other clutch control action) at the end of individual strokes.

...

(39) *Inch* means an intermittent motion imparted to the slide (on machines using part revolution clutches) by momentary operation of the Inch operating means. Operation of the Inch operating means engages the driving clutch so that a small portion of one stroke or indefinite stroking can occur, depending upon the length of time the Inch operating means is held operated. Inch is a function used by the die setter for setup of dies and tooling, but is not intended for use during production operations by the operator.

...

(49) *Single stroke* means one complete stroke of the slide, usually initiated from a full open (or up) position, followed by closing (or down), and then a return to the full open position.

straight side press. (T. 206). The Minster 400-36 has two light curtains set up in the same configuration as on Niagara 400-25 press that conform to the design and operational requirements of 29 C.F.R. § 1910.217 described *supra* at ¶ 7. (T. 81).

39. The photo at Exhibit C-16 depicts an employee's lock that has been applied to the Minster 400-36 press's e-stop button. (T. 32).

40. The machine specific LOTO procedure for the Minster 400-36 press is at Exhibit C-4. (T. 24-25).

41. The 11-second video clip at Exhibit R-2 (digital file number ending 357) depicts an employee engaged in correcting a mis-stamp or a mis-feed of the material that was being processed on the Minster 400-36 press during the CO's inspection. [The CO understood that the operator was engaged in "unjamming" the press, and consequently this is how she described the activity in the Citation. (T. 32, 82, 139, 175, 181).] The material being processed was a coil of steel sheeting. To correct the mis-stamp or mis-feed, the operator cut the steel sheet with hand shears and then re-threaded the sheet into the press. (T. 74, 82, 207-09). The operator performed this task while standing and moving within the light curtains with the e-stop engaged and locked. (T. 207-09, 226). Power to the Minster 400-36 press is needed for the operator to move the steel sheet through the die while standing in the light curtains. (T. 209-10, 255, 288-89). Power is also needed for the press's safety circuit to power the light curtains. (T. 255). With the operator working in the light curtain and with the e-stop locked, it not possible for the press to cycle or the ram to move or drift. (T. 210). If the light curtain were to turn off or fail, the press would not cycle. (T. 226).

42. Matsu does not require its operators to use its LOTO procedure to perform tasks of correcting a mis-stamp or mis-feed on the Minster 400-36 press.

43. Matsu's procedure for setting up a die on the Minster 400-36 press is identical to the procedure for the Niagara 400-25, and is reflected at Exhibit C-7. (T. 26-27, 207). The die-setting procedure does not contain instructions for locking out the equipment or instructions on whether to install any guarding for a particular die. (T. 59). Power to the press is necessary to set a die on the Minster 400-36 in order to move the ram and die and to jog the steel coil forward and backward while the operator is in the light curtain. (T. 288).

44. The Ross valve and safety circuit on the Minster 400-36 press work in the same manner as in the Niagara transfer press and the Niagara 400-25 straight side press. (T. 210, 284).

45. If the Ross valve on the Minster 400-36 press failed, the press would stop and could not restart. (T. 294-95). If a safety relay on the Minster 400-36 failed with either the e-stop locked or a light curtain having been penetrated, the press would stop. (T. 294-95).

46. The Minster 400-36 press could not be energized such that the press would cycle or the ram would move when an employee is in the light curtain or the e-stop is locked. (T. 284).

47. The activities of setting the die and re-threading a steel coil after a mis-feed or mis-stamp on the Minster 400-36 press, for which operators and die setters first engage and lock the e-stop and then unavoidably penetrate the light curtain, do not expose any employees to possible injury from any unexpected energization or startup of the press, or release of hazardous energy, and this is so even if the light curtain, or the Ross valve, or the safety relay, were to fail, whether individually or collectively. (T. 284, 289-90, 294-95).

Minster SE 4-800 Press

48. The photographs at Exhibits C-9 and C-10 depict the Minster SE 4-800 progressive press. (T. 27-28).

49. The machine specific LOTO procedure for the Minster SE 4-800 press is at Exhibit C-6. (T. 25-26).

50. The Minster SE4-800 press does not have any light curtain devices, but instead has two gates, one in the front and the other in the back, that meet the definition of “gate or movable barrier device” in 29 C.F.R. § 1910.211(d)(13).¹⁹ (T. 128-19). The press uses the gates as an interlock so that when either or both gates are open (thereby exposing the point of operation), there can be no energy transmitted to the clutch, and it is impossible for the press to cycle or the ram to move. (T. 214, 284-86, 292).

51. A separate switch controls each gate, so to lower the two gates from the “up” or open position, the operator must turn a switch for each of the gates. After turning the switches, an audible alarm begins to sound to indicate the gates are closing/lowering. It takes the gates about 60-90 seconds to close (lower) completely. (T. 129). If an employee were to be in the ram area when a gate started to close, the audible alarm would alert the employee to the lowering of the gates and the employee would have time to get out before the gate closed. (T. 129).

52. The Minster SE4-800 has a movable bolster that can be removed from the bed of the press by being unclamped and then rolled out of the die space on tracks. (T. 213-14). Like the two gates on the press, the bolster acts as an interlock so that when the bolster is unclamped from the bed of the press no power can be transmitted to the clutch. (T. 213-14, 285). When the bolster is unclamped from the bed of the press, there can be no energy transmitted to the clutch, and the press cannot cycle and the ram cannot drift because the safety circuit is broken, and the power for the clutch comes from the safety circuit. (T. 125, 128, 285-86, 290-91). If the safety circuit failed, it would fail in the off position, and no control power could be generated in that

¹⁹ Section 1910.211(d)(13) provides: “*Gate or movable barrier device* means a movable barrier arranged to enclose the point of operation before the press stroke can be started.”

position. (T. 285-86). Similarly, if the press's Ross valve failed, there would be no control power generated and no means to cycle the press. (T. 286).

53. Die changes on the Minster SE4-800 press are performed in a manner similar to that used for the Niagara transfer press. (T. 213-14). Matsu does not use its LOTO procedure to change the dies. (T. 121).

54. All employees involved in die changing must affix their locks to the press's engaged e-stop if the employee enters the press's ram space. (T. 129, 260). The press must be powered to complete some steps of the die changing process, including moving the bolster out of the press, moving the ram, and moving the coil through the die. (T. 127-28, 292).

55. After the bolster is rolled out of the ram space, an employee sweeps out the floor underneath the bolster to clear any slugs that fell out as the bolster was rolled out. (T. 118). This activity takes about 60-90 seconds. (T. 129). Matsu's protocol is that the e-stop is to be engaged and locked if an employee has to enter the ram space for any reason, including to sweep out slugs from under the ram, but some employees do not do this when sweeping out the slugs. (T. 129-30, 213). During her inspection, the CO observed an employee sweeping slugs out from under the ram without the e-stop activated. (T. 51-52). The gates to the press were working and were open (up) at the time, the e-stop was operable but not activated, and the bolster had been unclamped and moved out of the press. (T. 120, 130). The e-stop was not activated because there was a temporary malfunction that caused the doors to close prematurely when the e-stop was activated, so the employees relied on the interlock provided by the open doors and the unclamped bolster to prevent a hazardous condition in the die space during the die change operation. (T. 130-31). The press could not cycle with a gate up or with the bolster removed. (T. 130, 214, 285-92).

56. The activities of changing the die on the Minster SE4-800 press, including sweeping or mopping while under the ram during a die change (when employees are under the ram space with the gates open) do not expose any employees to possible injury from any unexpected energization or startup of the press, or release of hazardous energy. (T. 214, 284, 289-90, 294-95).

USI Clearing 1000 Press

57. The photograph at Exhibit C-17 depicts the USI Clearing 1000 press. (T. 32-33). This press has one light curtain that conforms to the design and operational requirements of 29 C.F.R. § 1910.217 described *supra* at ¶ 7. (T. 85-86).

58. The photograph at Exhibit C-18 depicts the control panel for the USI Clearing 1000 press, which includes the e-stop (the red button labeled “main motor stop”).

59. The machine specific LOTO procedure for the USI Clearing 1000 press is at Exhibit C-5. (T. 25). Any employee who penetrates the light curtain as part of die set up operations, must first engage the press’s e-stop and lock it with her individual lock. (T. 32-33, 44, 212-13, 261). Matsu does not require its operators to utilize LOTO procedures when setting up and changing the die on the USI Clearing 1000 press. (T. 33).

60. The bolster on the USI Clearing 1000 press does not move. Dies are moved on and off the bolster by a forklift-type machine. After a die is removed, employees sweep out slugs that remain on the bolster to prepare the bolster for the next set up. The bolster is about four feet wide, and it is not necessary for an employee to get on top of the bolster to sweep out the slugs, although some body parts enter the die space while sweeping out slugs from under the ram. An employee sweeping out the bolster while standing next to it would necessarily be standing in the light curtain.

61. The Ross valve and safety circuit on the USI Clearing 1000 press work in the same manner as on the Niagara transfer press and the Niagara 400-25. (T. 284). The press could not be energized such that the press could cycle or the ram could move or drift when an employee is in the light curtain or when the e-stop is engaged and locked on the USI Clearing 1000 press. (T. 284).

62. The activities of setting the die, including sweeping out the fixed bolster as part of the die-setting operations, in which operators and die setters lock-out the e-stop and break the light curtain, do not expose any employees to possible injury from any unexpected energization or startup of the press, or release of hazardous energy, and this is so even if the light curtain, or the Ross valve, or the safety relay, were to fail, whether individually or collectively. (T. 279-82, 284, 292).

63. The photograph at Exhibit C-21 depicts the selector switch on the USI Clearing 1000 press by which the mode of operation (off, inch, single, continuous) is selected, (as was described *supra* in footnote 18 in connection the Niagara 400-25 press). (T. 36). The selector switch has an integrated mechanical locking device that the operator can use to select the mode of operation and that would prevent any other person changing the mode of operation. (T. 218). The CO recalled that some Matsu official or employee had told her that this key did not actually lock the selector switch, but she provided no more specific information regarding the identity of the person who communicated this, or about the operability of the lock. (T. 160-61). There is no substantial evidence presented to support a finding that the fixing of the selection on the stroking selector on the USI Clearing 1000 press was not “by means capable of supervision by the employer” as required by 29 C.F.R. § 1910.217(b)(7)(iii), quoted *supra* at footnote 3.

Employee Identification on Lockout Device
Used During Repair of Ravne Press

64. During the OSHA inspection, the CO observed some maintenance employees doing repairs on the Ravne power press and utilizing Matsu's LOTO procedure while doing so. The CO observed that two of the three lockout devices that had been applied to the press's electrical disconnect did not indicate the identity of the employee who had applied the lock. The CO took a photograph that showed one of the two lockout devices that lacked identification, which was received in evidence at Exhibit C-19. The CO had no direct evidence that anyone in a Matsu supervisory or managerial position knew that the two lockout devices lacked identification, but she believed that Matsu's knowledge of that condition was established because Matsu had provided the locks and a supervisor knew the maintenance work was being done on the press. (T. 33-34, 60-62, 160).

DISCUSSION

The parties have agreed that the Commission has jurisdiction and to the coverage of the Act, both of which the record fully supports. (Complaint, ¶¶ I & II; Answer, ¶¶ I & II).

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Control of Hazardous Energy Citation Items – § 1910.147
(Citation 1, items 2, 3, 4a, 4b; Citation 2, item 2)

In *General Motors Corporation, CPGC Oklahoma City Plant*, 22 BNA OSHC 1019, 1022 (No. 91-2843E, 2007) (consolidated), the Commission provided the following overview of the LOTO standard, which is codified at 29 C.F.R. § 1910.147 and is captioned “The control of hazardous energy (lockout/tagout)” (internal citations omitted):

The LOTO standard ... was promulgated to prevent industrial accidents during servicing of machines that (1) remain in an operational mode, (2) are turned off but connected to a power source, (3) retain stored energy, or (4) are reactivated by another worker unaware that servicing is in progress. In general, the LOTO standard requires an employer to establish a program that includes employee training, use of energy control procedures, and periodic inspections designed to prevent employee exposure to the unexpected energization of equipment during servicing and maintenance operations, and dovetails with the requirements for the safe operation of machines during production, as prescribed by 29 C.F.R. Part 1910, subpart O.

The LOTO standard’s “scope” provision, § 1910.147(a)(1)(i), provides that the standard “covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.” Thus, the LOTO standard “applies only where the Secretary shows that unexpected energizing, start up or release of stored energy could occur and cause injury.” *Gen. Motors Corp., Delco Chassis Div. (GM-Delco)*, 17 BNA OSHC 1217, 1218 (No. 91-2973, 1995) (consolidated), *aff’d*, 89 F.3d 313 (6th Cir. 1996). Whether an energy source presents the potential for hazardous energy involves a two-pronged test: (1) whether unexpected energization, start up or release of stored energy could occur, and (2) if it can occur, whether it could cause injury to employees. *See Otis Elevator Co. v. Sec’y of Labor*, 762 F.3d 116, 121 (D.C. Cir. 2014); *see also* § 1910.147(c)(1) (requiring employers to establish a LOTO program “where the

unexpected energizing, start up or release of stored energy **could occur and cause injury**” [boldface and underscore supplied]); *Control of Hazardous Energy Sources (Lockout/Tagout): Final Rule*, 54 Fed. Reg. 36644, 36666 (Sept. 1, 1989) (“If an energy source does not have the capability of causing injury to employees, it is not ‘hazardous energy’ within the scope of this standard”).

The Secretary’s theory with respect to all except one of the alleged LOTO violations rests on the premise that “control circuit type devices” do not constitute “energy isolating devices” as defined in the LOTO standard, and thus are ineffective in isolating hazardous energy under the LOTO standard.²⁰ The Secretary’s premise is correct, but it pertains to whether an employer has complied the terms of the LOTO standard (the second element of the Secretary’s burden of proof), and completely bypasses the first element of the Secretary’s burden of proof, which is to show that the LOTO standard applies to the cited service and maintenance activities. *Cf. Alro Steel Corp.*, 25 BNA OSHC 1839, 1852 (No. 13-2115, 2015) (ALJ) (rejecting the Secretary’s argument “that anytime a machine is not isolated from its energy source, there is a hazard that the machine could incur an unexpected release of energy,” and rejecting further the argument that “relying on control circuitry allows the machine to remain energized and, therefore, subject to unexpected energization through accident or mechanical failure”).

The Commission has rejected the Secretary’s implicit position that the LOTO standard “presumes that there always is a hazard of unexpected energization, etc., on every industrial machine and piece of equipment during servicing and maintenance.” *GM-Delco*, 17 BNA OSHC at 1220. Rather, the Commission has determined that the “terms of the standard clearly

²⁰ *See supra* at footnote 6 for the LOTO standard’s definition of “energy isolating device” in § 1910.147(b), which provides in part: “Push buttons, selector switches and other control circuit type devices are not energy isolating devices.”

place the burden on the Secretary to *show* that there is such a hazard as to the cited machines and equipment.” *Id.* (emphasis in original). The Commission has decided that control circuit type devices in machines may operate in such a manner that eliminates the potential of hazardous energy for certain servicing or maintenance activities, so that the LOTO standard does not apply to those activities. *See GM-Delco*, 17 BNA OSHC at 1220 (determining LOTO standard not applicable where employer relied on control circuit type devices, including electronically interlocked gates and e-stop buttons, to eliminate the potential for hazardous energy); *see also Alro Steel Corp.*, 25 BNA OSHC at 1854 (relying on *GM-Delco* in determining LOTO standard was not applicable where control circuit type devices, including locking out the motor start button, were relied upon to prevent unexpected energization or start up or release of stored energy during a particular servicing activity).

The Secretary did not meet his burden to establish that the LOTO standard was applicable to any of the service and maintenance activities identified in the LOTO citation items (except for citation 2, item 2), because the evidence was insufficient to support the conclusion that the unexpected energization or startup or release of stored energy could occur while the cited service or maintenance activities were conducted. To the contrary, as set forth *supra* in the Findings of Fact, ¶¶ 27, 35, 47, 56 and 62, a preponderance of the evidence established that the cited service and maintenance activities do not expose any employees to possible injury from any unexpected energization or startup of the press, or the release of stored energy.

This conclusion is based on the weighing of the testimony of the principal witness for each party—the investigating CO for the Secretary (Ms. Corrine Majoros), and the plant’s general manager (Mr. Jason Bleoo) for Matsu. No expert witnesses were presented. *Cf. Alro Steel Corp.*, 25 BNA OSHC at 1843-49 (weighing the testimony of three expert witnesses—the

LOTO coordinator for an OSHA region, a journeyman electrician, and a professional engineer with a background in electrical engineering—in determining LOTO standard was not applicable). While both Ms. Majoros and Mr. Bleoo exuded confidence and competence in their demeanors and provided straightforward testimony, neither had the technical background or knowledge to address certain relevant matters, and so on such matters there is an evidentiary void. (*E.g.*, T. 70, 73, 151-53, 171-76, 266-67). The record can hardly be deemed comprehensive with respect to the design, construction, application, and operation of the relevant presses, and consideration of the Findings of Fact *supra* should take this into account.

In view of the absence of direct evidence on many aspects of the specifications and operations of the Matsu presses, and in the absence of any evidence to the contrary, the Matsu presses were presumed to conform to the requirements of the mechanical power press standard at 29 C.F.R. § 1910.217. Conformance with the requirements of that standard informed the Findings of Fact, *supra*.

At the time of the hearing, CO Majoros had worked for OSHA as a CO for eight years, during which time she had received formal training in machine guarding and in the control of hazardous energy at the OSHA Training Institute. Before working for OSHA, she had been employed for four years by the City of Toledo's Division of Environmental Services. She has an undergraduate degree in environmental science. (T. 16-17). In the conduct of her inspection, CO Majoros did not perform any tests of any presses to determine if gravitational drift was possible. (T. 70). Neither she nor anyone else at OSHA reviewed any manuals or plans respecting any of the presses. (T. 70-71). The CO spoke with three Matsu managerial employees—the plant manager, the maintenance supervisor, and the human resources manager.

(T. 162, 164). The only non-managerial employees she interviewed were press operators; she did not interview any non-managerial maintenance employees. (T. 95).

At the time of the hearing, Mr. Bleoo had been serving as the general manager of Matsu's Ohio plant for six months, so he had not been employed there at the time of the OSHA inspection. (T. 186). Before assuming the general manager position at the Ohio plant, Bleoo had been employed since 1991 by companies affiliated with Matsu. (T. 186). That affiliated group of companies is now known as the Matcor-Matsu Group of companies, and it acquired the Ohio plant in October 2009. (T. 189). Altogether, there are about 15 Matcor-Matsu facilities. (T. 247). Although Bleoo had not been permanently assigned to the Ohio plant until six months before the hearing, he had had regular involvement with the Ohio plant since the Matcor-Matsu group acquired it in 2009. (T. 186-87).

Bleoo was familiar with the mechanical power presses at the Ohio plant as of the time of the OSHA inspection in January 2014. He has worked in and around mechanical power presses for approximately 14 years in roles as operator, supervisor, production scheduler, plant manager, and general manager. (T. 187, 264). He does not possess a college degree. (T. 263). He has received training related to mechanical power presses in the form of detailed training materials produced by a trade association known as Precision Metalforming Association, which covers "setup, safety, lockout, and then the operation of both mechanical power presses, both partial and full revolution presses." (T. 187-88). He was awarded an industrial motor control certificate from Delta State University upon completion of a five-month night school program that concerned "[a]ll sorts of motor control, ... electrical motor controls for presses, any sort of machines." (T. 188). He also has a point of operation control certificate from the Allen-Bradley company for industrial logic control. (T. 188).

As between CO Majoros and Mr. Bleoo, Bleoo had far greater experience and knowledge about the mechanical power presses that were the subject of the citation items. While Bleoo certainly was not a neutral witness, there is nevertheless no reasoned basis not to credit his completely plausible testimony regarding the design of the Matsu presses and how the presses function during the cited service and maintenance activities. His testimony about the operation and functioning of the presses was consistent with the design and operational requirements to which mechanical power presses must comply under the mechanical power press standard at § 1910.217.

The only evidence that the Secretary presented that controverted Bleoo's testimony respecting the manner in which the presses operated was (1) the CO's conclusory testimony that simply presupposed the presence of hazardous energy in the presses during the cited maintenance and service activities because the employees locked control circuit type devices and not energy isolating devices (*e.g.*, T. 30-32, 38-39, 44-46, 54-56), and (2) the CO's sometimes uncertain testimony on how the press's safety systems functioned (*e.g.*, T. 88-89, 93).

Citation 1, item 4b -- § 1910.147(d)(3)

Item 4b of citation 1 alleged that Matsu had violated § 1910.147(d)(3), which provides that as part of the LOTO process, “[a]ll energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy source(s).” Item 4b alleged that Matsu had violated this standard in four instances, each instance relating to a separate press.

- *Instance a.* As to the Niagara transfer press, the citation item alleged that Matsu had violated the standard “in that energy isolating devices were not physically operated and locked out prior to die change and set up operations.” The CO testified that Matsu was required to use LOTO procedures during die set-up, as well during the attachment of the nut feeder to the press. (T. 55, 74-75).

- *Instance b.* As to the Niagara 400-25 press, the citation item alleged that Matsu had violated the standard in that “employees were exposed to crushing and/or amputation hazards when accessing the hazard area of the ... press to set a die date stamp,” and that Matsu “did not assure that mechanical and gravitational hazardous energy sources were isolated/controlled before employees serviced the press.” The CO testified that Matsu was required to use LOTO procedures to change the date stamp on the press. (T. 74-75, 92-92, 170-71).
- *Instance c.* As to the Minster 400-36 press, the citation item alleged Matsu had violated the standard in that “employees unjamming parts in the hazard area of the ... press were exposed to crushing and/or amputation hazards” and that Matsu “did not assure that mechanical and gravitational hazardous energy sources were isolated/controlled before employees unjammed the press.” The CO testified that Matsu was required to use LOTO procedures for the servicing activity that she described as “unjamming” the press (and which Bleoo described as the press operator correcting a mis-feed or mis-stamp). (T. 32, 46-47, 55, 74-75, 82, 206-10).
- *Instance d.* As to the USI Clearing 1000 press, the citation item alleged Matsu had violated this standard in that “employees were exposed to crushing hazards in that energy isolating devices were not physically operated and locked out on the ... press prior to die change and set-up operations,” and that Matsu “did not assure that mechanical and gravitational hazardous energy sources were isolated/controlled before set-up operations.” The CO testified that Matsu was required to use LOTO procedures during die changing, and this included the activity of sweeping out the fixed bolster after the die had been removed. (T. 32-33, 55, 85-86, 92-93).

As detailed *supra* in ¶¶ 27, 35, 47, 56 and 62 of the Findings of Fact, a preponderance of the evidence established that none of the cited servicing and maintenance activities that the Secretary alleged required utilization of LOTO procedures, exposed employees to injury from the unexpected energization or startup of any of the four presses, or the release of stored energy

from the presses.²¹ The Secretary having failed to prove that the cited standard is applicable to the cited service and maintenance activities, item 4b of citation 1 must be vacated. *GM-Delco*, 17 BNA OSHC 1217.

Citation 1, item 4a -- § 1910.147(d)(2)

Item 4a of citation 1 alleged that Matsu violated § 1910.147(d)(2), which specifies that the “machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment.” The citation item alleged that Matsu violated this standard in that on or about January 9, 2014, “while setting up the Minster SE4-800 press, the press was not shut down and energy isolating devices were not used to control” hazardous energy. The CO observed an employee sweeping debris while under the ram as part of the die change, and that not only were LOTO procedures not being used, but the e-stop had not even been engaged. The CO concluded the employee who was sweeping in the die space was exposed to hazardous energy. (T. 52-53).

The Secretary bears the burden to show that “there is some way in which the particular machine could energize, start up, or release stored energy without sufficient advance warning to the employee.” *GM-Delco*, 17 BNA OSHC at 1219-20; *accord Reich v. Gen. Motors Corp.*, 89 F.3d 313, 315 (6th Cir. 1996) (concluding “that the plain language of the lockout standard unambiguously renders the rule inapplicable where an employee is alerted or warned that the machine being serviced is about to activate”). “Energization is ‘unexpected’ in the absence of some mechanism to provide adequate advance notice of machine activation.” *Dayton Tire*, 23 BNA OSHC 1247, 1251 (No. 94-1374, 2010) (*citing Gen. Motors Corp.*, 22 BNA OSHC 1019,

²¹ The cited servicing or maintenance activities for the respective presses were “die change and set up operations” for the Niagara transfer press, setting a die date stamp on the Niagara 400-25 press, unjamming parts on the Minster 44-36 press, and die change and set-up operations on the USI Clearing 1000 press.

1022 (No. 91-2843E, 2007) (consolidated)), *aff'd in relevant part*, 671 F.3d 1249 (D.C. Cir. 2012).

As set forth *supra* in Findings of Fact ¶¶ 52-55, the die change on the Minster SE4-800 press, including the sweeping out the bolster, was done with the press's two gates in the open (up) position. The ram could not move or drift with either of the two gates open. The gate was designed so that it took 60-90 seconds for the gate to close from the open position after the gate switches were activated, and an audible alarm sounds as the gate lowers. Any employee underneath the ram would recognize the gate was lowering and would have ample time to get out of the die space. Even if both gates were lowered and an employee failed to exit the die space (and there was no evidence there was any reasonable possibility this could occur unintentionally) the press still would not have been able cycle if the bolster had not been returned to the die space and re-clamped to the bed of the press.

The Secretary has failed to prove that there was "some way in which the particular machine could energize, start up, or release stored energy without sufficient advance warning to the employee," and thus has not proven the Minster SE4-800 press could energize unexpectedly during set up procedure. *GM-Delco*, 17 BNA OSHC at 1219-20; *see also Quebecor World*, No. 01-0031, 2001 WL 1083763, at *4 (O.S.H.R.C.A.L.J. September 14, 2001) (finding that the "closing of the gate, the start of the pneumatics, and the audible alarm would, of necessity, alert the operator to the ... impending start-up," and "[b]ecause the operator would inevitably become aware of this activity, the machine's startup would not be unexpected"). The Secretary having failed to prove that the cited standard is applicable, item 4b of citation 1 must be vacated.

Citation 1, item 3 -- § 1910.147(c)(7)(i)

Item 3 of citation 1 alleged that Matsu violated § 1910.147(c)(7)(i), which requires that as part of an energy control program an “employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees.” Item 3 alleged that Matsu violated this standard in that employees who performed “press set-up, die change, and servicing tasks were not trained to isolate hazardous energy sources to protect against the unexpected energization and/or release of stored energy.” The CO testified the basis of this citation item was that Matsu had trained employees to lock out the e-stops rather than to lock out an “energy isolating device” for the service and maintenance activities that were the basis of the items 4a and 4b of citation 1. (T. 48-49, 97-99).

As addressed above in connection with items 4a and 4b, the LOTO standard did not require employees to utilize LOTO procedures when engaged in the maintenance and service activities that are cited in those items. There is no evidence that any Matsu employee did not receive the training that the LOTO standard requires. Item 3 of citation 1 must therefore be vacated.

Citation 1, item 2 -- § 1910.147(c)(4)(ii)

Item 2 of citation 1 alleged that Matsu’s LOTO procedures were deficient and that it had therefore violated § 1910.147(c)(4)(ii). Section 1910.147(c)(4) provides:

(4) *Energy control procedure.* (i) 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.

NOTE: *Exception:* [Omitted.]

(ii) The procedures shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized

for the control of hazardous energy, and the means to enforce compliance including, but not limited to, the following:

(A) A specific statement of the intended use of the procedure;

(B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;

(C) Specific procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them; and

(D) Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.

Item 2 of citation 1 alleged that Matsu had violated this standard in five instances, each instance relating to one of the presses identified in items 4a and 4b of citation 1.

- *Instance a.* As to the Niagara transfer press, the citation item alleged that Matsu violated the standard in that “lockout procedures for the ... press did not identify specific steps to block gravitational energy and how to verify the effectiveness of mechanical energy control(s),” and that employees “were exposed to ... hazardous energy sources while performing set-up operations.”
- *Instance b.* As to the Niagara 400-25 straight side press, the citation item alleged that Matsu violated the standard in that “lockout procedures for the ... press did not identify specific steps to control hazardous energy sources, contain instructions for placement of energy control devices, or how to determine the effectiveness of energy control procedures,” and that employees “were exposed to ... hazardous energy sources while accessing the die space to set date stamps.”
- *Instance c.* As to the Minster 400-36 press, the citation item alleged that Matsu violated the standard in that lockout procedures for the “press did not identify specific steps to control hazardous energy sources, contain instructions for placement of energy control devices, or how to determine the effectiveness of energy control procedures,” and that employees “were exposed to ... hazardous energy sources while accessing the die space to unjam the press.”
- *Instance d.* As to the USI Clearing 1000 press, the citation item alleged that Matsu violated the standard in that “lockout procedures for the ... press did not identify specific steps to block gravitational energy and how to verify the

effectiveness of mechanical energy control(s),” and that employees “were exposed to ... hazardous energy sources while performing set-up operations.”

- *Instance e.* As to the Minster SE4-800 press, the citation item alleged that Matsu violated the standard in that “lockout procedures for the ... press did not identify specific steps to block gravitational energy and how to verify the effectiveness of mechanical energy control(s),” and that employees “were exposed to ... hazardous energy sources while performing set-up operations.”

As described previously, the LOTO standard does not apply to the service or maintenance activities described in each of the five instances alleged in item 2. Rather, Matsu was not required to utilize LOTO procedures when press operators and die setters were (1) performing set up operations on the Niagara transfer press, (2) changing the date stamp on the Niagara 400-25 press, (3) “unjamming” (or, as Bleoo described, correcting a mis-stamp or mis-feed) on the Minster 400-36 press, (4) performing set-up operations on the USI Clearing 1000 press, and (5) performing set-up operations on the Minster SE4-800 press.

While some of the machine specific LOTO procedures (Exhibits C-2, C-3, C-4, C-5 & C-6) may appear on their face to lack some of the specificity required by § 1910.147(c)(4)(ii)(A) thru (D), the adequacy of those procedures was not tested against any service or maintenance activity to which the LOTO standard actually does apply. Accordingly, to conclude that any of the machine specific procedures did not meet the cited standard would involve speculation and conjecture as whether the procedures meet the terms of the standard in actual application.

For these reasons, item 2 of citation 1 must be vacated.

Citation 2, item 2 -- § 1910.147(c)(5)(ii)(D)

Item 2 of citation 2 alleges that Matsu violated § 1910.147(c)(5)(ii)(D), which provides: “Lockout devices ... shall indicate the identity of the employee applying the device(s).” The citation item alleged that a lockout device that was being used during clutch repair work on the

Ravne press did not have the required identifying information of the employee who had applied the device. In her testimony, the CO stated that two of the three lockout devices she observed in use did not bear the required employee identification. The CO did not know whether any managerial personnel at Matsu knew about the two lockout devices that lacked identification. (T. 160).

The Secretary has established that the cited standard applies, that the terms of the standard were violated, and that employees were exposed to the violative condition. However, the Secretary has failed to prove that Matsu knew, or with the exercise of reasonable diligence could have known, of the violative condition. There is no evidence that any Matsu managerial employee had actual knowledge of the violative condition. In order to prove the violation, therefore, the Secretary had to prove that Matsu had constructive knowledge of the violative condition.

To prove constructive knowledge, the Secretary must show that Matsu's failure to discover the violative condition was due to a lack of reasonable diligence. *See Ragnar Benson Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999). "In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *S. J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016). Whether an employer has exercised reasonable diligence is a question of fact that "will vary with the facts of each case." *Martin v. OSHRC*, 947 F.2d 1483, 1484 (11th Cir. 1991); *see also Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129 (No. 92-0851, 1994) (finding that a preponderance of the evidence established the cited employer was reasonably diligent); *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No.

99-0707, 2001) (noting that Secretary has burden of identifying what reasonable diligence required).

An employer can “be charged with constructive knowledge of conditions that could be detected through an inspection or examination of the worksite.” *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91–3467, 1995). “Where the employer maintains an adequate inspection program, the burden is on the Secretary to demonstrate that the employer’s failure to discover the violative condition was due to a lack of reasonable diligence.” *Trinity Marine Nashville, Inc.*, 19 BNA OSHC 1015, 1017 (No. 98-0144, 2000), *rev’d on other grounds*, 275 F.3d 423 (5th Cir. 2001). Whether an employer should have discovered a violative condition that is plainly visible requires consideration of how long the violative condition existed. *Thos. Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2086 (No. 06-1542, 2012) (ruling that the absence of evidence of how long a violative condition existed precludes finding that the employer could have known of the condition with the exercise of reasonable diligence.)

The evidence is insufficient to support a finding that in the exercise of reasonable diligence, Matsu could have known of the violative condition. There is no evidence respecting how long the lockout devices without the required identification had been in that condition, how long they had been in place, or the circumstances under which they came to be used. *Cf. Major Constr.*, 20 BNA OSHC 2109 (No. 99-0943, 2005) (concluding that where there was no evidence of how long the violative condition existed, Commission is unable to evaluate whether the employer could have known of the condition if it had been reasonably diligent). Moreover, the Secretary presented no evidence respecting Matsu’s inspection program.

While the whole of the evidence might support a reasonable inference that Matsu could have known of the violative condition in the exercise of reasonable diligence, that evidence is

thin, and it is not the preponderant evidence. Accordingly, citation 2, item 2 is vacated for the Secretary's failure to establish constructive knowledge.

Mechanical Power Press Citation Items – § 1910.217
(Citation 1, item 6b; Citation 2, item 3)

Citation 1, Item 6b -- § 1910.217(d)(9)(i)

Item 6b of citation 2 alleged that Matsu violated § 1910.217(d)(9)(i) of the mechanical power press standard, which provides: “(9) *Diesetting*. (i) The employer shall establish a diesetting procedure that will insure compliance with” § 1910.217(c). Section 1910.217(c) is captioned “Safeguarding the point of operation,” and has nearly 60 subparagraphs that address the matter of safeguarding the point of operation on mechanical power presses. Section 1910.217(c) takes up about three and a half pages of the Code of Federal Regulations.

The citation item alleges that Matsu violated the cited standard in that it “did not assure die setting procedures that would protect employees from pinch points were established,” and that “[e]mployees were not protected through the use of adequate machine guarding and/or the isolation of energy sources when setting up mechanical power presses.”

The CO testified that Matsu’s written die setting procedures were deficient because they did not “instruct employees at what point they should be locking out the equipment,” and that the die setting procedures should instruct employees whether there is any machine “guarding that they need to install for a particular die.” (T. 59). She based this conclusion on the written die setting procedures themselves (Exhibits C-7 & C-8) and on “the fact that employees weren’t locking out during die setting.” (T. 59).

The cited standard requires that Matsu’s die setting procedures insure compliance with § 1910.217(c). There is no evidence that Matsu’s die setting procedures failed to comply with any of the myriad requirements imposed by § 1910.217(c).

The LOTO standard provides that other standards in part 1910 that require the use of lockout or tagout (such as § 1910.217) are “supplemented by the procedural and training requirements” of the LOTO standard. § 1910.147(a)(3)(ii). To the extent that Matsu’s die setting procedures should have addressed the control of hazardous energy requirements imposed by the LOTO standard, any failure to do so would constitute a violation of the LOTO standard, not a violation of the mechanical power press standard. The Secretary has failed to prove that Matsu violated the cited standard. Item 6b of citation 1 must be vacated.

Citation 2, Item 3 -- § 1910.217(b)(7)(iii)

Item 3 of citation 2 alleges that Matsu violated § 1910.217(b)(7)(iii), which is set forth *supra* in footnote 3. The citation item alleges that Matsu violated this standard in two instances, one involving the Niagara 400-25 press (instance a), and the other involving the USI Clearing 1000 press (instance b). The citation alleged that Matsu violated the cited standard in both instances in that it “did not assure that the operating mode on the ... press was capable of being set in a fixed position,” and that “[e]mployees were exposed to an amputation hazard in that the operating mode could be changed by a selector switch that was not capable of being secured in a fixed position and supervised by the employer.”

As set forth *supra* in Findings of Fact ¶¶ 37 and 63, the evidence is insufficient to support a finding that Matsu violated the terms of the cited standard. Item 3 of citation 2 must therefore be vacated.

ORDER

The foregoing decision constitutes findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a). If any finding is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the

contrary notwithstanding. Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, item 2, alleging five instances of a serious violation of 29 C.F.R. § 1910.147(c)(4)(ii), having not been proven, is VACATED.

2. Citation 1, item 3, alleging a serious violation of 29 C.F.R. § 1910.147(c)(7)(i), having not been proven, is VACATED.

3. Citation 1, item 4a, alleging a serious violation of 29 C.F.R. § 1910.147(d)(2), having not been proven, is VACATED.

4. Citation 1, item 4b, alleging four instances of a serious violation of 29 C.F.R. § 1910.147(d)(3), having not been proven, is VACATED.

5. Citation 1, item 6a, alleging a serious violation of 29 C.F.R. § 1910.217(c)(1)(i), having been withdrawn by the Secretary, is VACATED.

6. Citation 1, item 6b, alleging a serious violation of 29 C.F.R. § 1910.217(d)(9)(i), having not been proven, is VACATED.

7. Citation 2, item 2, alleging an other than serious violation of 29 C.F.R. § 1910.147(c)(5)(ii)(D), having not been proven, is VACATED.

8. Citation 2, item 3, alleging two instances of an other than serious violation of 29 C.F.R. § 1910.217(b)(7)(iii), having not been proven, is VACATED.

/s/
William S. Coleman
Administrative Law Judge

Dated: September 30, 2016