



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

SECRETARY OF LABOR,

Complainant,

v.

DENTSPLY US PROSTHETICS, LLC,

Respondent.

OSHR DOCKET NO. 16-0140

Appearances:

Oscar L. Hampton III, Esq., Regional Solicitor, Matthew R. Epstein, Esq., Office of the
Regional Solicitor, Philadelphia, PA
For the Complainant

John M. Gilman, Esq., York, PA
For the Respondent

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

Dentsply US Prosthetics, LLC (Dentsply or Respondent) manufactures dental products at 470 College Avenue, York, PA (the Facility). Following a reported injury, the Occupational Safety and Health Administration (OSHA) inspected the Facility on June 23, 2015. As a result of the inspection, a Citation and Notification of Penalty (Citation) alleging a violation of 29 C.F.R. § 1910.212(a)(1) and proposing a \$7,000.00 penalty, was issued.

Dentsply timely contested the Citation, bringing the matter before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act). A hearing was held in York, PA

on November 17 and 18, 2016. Both parties filed post-hearing briefs. For the following reasons, the Citation is affirmed and a \$7,000 penalty is assessed.

JURISDICTION

Dentsply is an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act. (Stip. A, B, F; Answer at 1.) Dentsply admitted that it employed the injured employee and that the Commission has jurisdiction over this proceeding. (Answer at 1; Tr. 49-51.) Based upon the parties' stipulations and the record, Dentsply is a covered business and the Commission has jurisdiction.

FACTUAL BACKGROUND

Dentsply makes acrylic teeth and other dental products. (Tr. 17, 171-72, 175.) To do so, employees use various molds and presses. (Tr. 17-18; Jt. Ex. 2.) Some presses are manual and others are automatic. (Tr. 18, 34.) On June 17, 2015, an employee suffered an injury while working at one of the Facility's automatic presses referred to as Rotary Press No. 26 ("Press 26").¹ (Tr. 22, 124, 212-13.) To use Press 26, the employee first assembles a mold and then manually places it into the machine's loading area. (Tr. 17, 20-22, 26, 28, 39, 211, 269-70.) A sensor detects the mold and a "hook arm" activates automatically to push the mold into an area where the machine applies heat and tremendous pressure. (Tr. 34, 40, 42-44, 85, 114, 119, 122, 141-42, 215-16, 269.) Once the mold is inside this area, a separate "swing arm" comes down in front of it. (Tr. 161-62.) The machine compresses the mold before automatically pushing it out for the next stage in the production process. (Tr. 35, 227; Jt. Exs. 2, 4b.)

¹ The parties stipulated that the injured employee began work at Dentsply as a temporary employee referred by Adecco. (Tr. 170.) Adecco is a separate company Respondent used to recruit new hires. (Tr. 235, 242; Jt. Ex. 7 at 3; Resp't Br. at 3.)

Respondent required workers who would operate machinery like Press 26 to participate in a ninety-day training program. (Tr. 186, 192, 285-86, 303; Ex. R-1 at 3.) This program includes both classroom instruction as well as the assignment of a trainer to shadow and instruct the new worker. (Tr. 17-18, 182-84, 326; Jt. Ex. 8.) According to Respondent, the pace at which workers progressed through the training program varied somewhat depending upon skill. (Tr. 302-03.) At a minimum, however, Dentsply was to directly supervise workers for their first thirty days at the Facility. (Tr. 191, 285-86, 303; Ex. R-1 at 3.)

Despite this requirement for direct supervision, on the morning of the incident, a worker who started at Dentsply approximately two weeks earlier was assembling molds and placing them into Press 26 outside the presence of a supervisor.² (Tr. 17, 38-39, 47, 90, 134.) He was early in his training and had never worked with any automatic presses similar to Press 26 until the day before his injury. (Tr. 20, 37-38, 47, 90; Jt. Pre-Hr'g at 5.a; Stip. C.) According to his testimony, he arranged the materials in a mold and then moved it into the loading area. (Tr. 17, 29-30, 40.) At that point, his hand was somehow carried into the part of the machine that applies heat and pressure. (Tr. 30.) He tried to stop the machine but was unable to do so before the press clamped down on his hand. (Tr. 30, 45-46.) He could not free himself even after the machine was shut off. (Tr. 30, 249, 251.) As a result of the incident, he lost three fingers.³ (Stip. G; Tr. 134.)

Dentsply notified OSHA of the injury and Compliance Office Jeffrey Haffner (CO) conducted a site inspection on June 23, 2016. (Tr. 74, 120.)

² Neither the trainer nor the unit leader was present when the injury occurred. (Tr. 29; Jt. Ex. 3.)

³ The parties stipulated that: “[employee], while operating Press Number 26 on June 17, 2015, suffered an injury and as a result of that injury three fingers on his left hand have been amputated, that is his index, middle and ring fingers on his left hand.” (Tr. 134.)

DISCUSSION

Applicability & Violation

To establish a violation of any OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. (Jt. Pre-Hr'g Report at 6.a.) *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The Secretary has the burden of proving each of these elements by a preponderance of the evidence. *Id.*

In addition to these elements, to prove a violation of 29 C.F.R. § 1910.212(a)(1), the Secretary must also show that there was a hazard in a machine area. *Buffets, Inc.*, 21 BNA OSHC 1065, 1066 (No. 03-2097, 2005) (Secretary must establish the rotating parts presented a hazard). This is necessary because § 1910.212(a)(1) requires employers to guard against “hazards” in machine areas without providing specific ways to do so.⁴ *Id.*; *Ladish Co.*, 10 BNA OSHC 1235, 1237 (No. 78-1384, 1981). So, the Secretary must show that the hazard results from the way the machine functions and how it operates. *Id.* The fact that it is possible for an employee to come into contact with a machine’s moving parts alone is insufficient to show a hazard. *Id.* *See also Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421 (No. 89-0553, 1991) (possibility of exposure to an unguarded nip point insufficient to sustain a violation).

⁴ Specifically, the standard requires:

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.

29 C.F.R. § 1910.212(a)(1).

The hazards presented by Press 26 were open and obvious even before anyone was hurt. (Jt. Ex. 2.) *See Ladish*, 10 BNA OSHC at 1237 (finding, in connection with an alleged violation of § 1910.212(a)(1), that the descending arm presented a “readily apparent” danger). Indeed, Respondent does not suggest that the machine was not hazardous or that it did not require guarding. (Tr. 223, 226; Jt. Ex. 2.) It recognized that Press 26 required training and supervision to be safely operated. (Tr. 182-92, 303; Ex. R-1.) Employees loaded the molds by hand just a short distance from where the machine automatically applied tremendous heat and pressure.⁵ (Tr. 28; Jt. Exs. 2, 4b.) Thus, the manner in which employees operated Press 26 distinguishes this case from those relied on by the Respondent.⁶ (Resp’t Br. at 14-18.) The actual injury further shows the need for guarding in the machine area. *See A.E. Burgess Leather Co., Inc.*, 5 BNA OSHC 1096, 1097 (No. 12501, 1977) (finding that the occurrence of injuries, while not conclusive, is probative of whether a machine presents a hazard), *aff’d*, 576 F.2d 948 (1st Cir. 1978).

Having found that the machine area presented a hazard, we turn to whether Respondent violated the cited standard by, as the Secretary alleges, failing to: “effectively guard the point of operation on the Rotary Press #26 where employees place a disk into the press, thereby exposing

⁵ On the day of the inspection Press 26 was not in operation. (Tr. 165.) The CO observed a similar machine, but he was unable to measure the exact distance between where the mold is placed by hand and where the heat and pressure is applied because that machine could not be locked out. (Tr. 137.) However, the videographic evidence supports the Secretary’s position that it was a short distance. (Jt. Ex. 4b.) Further, the hook arm automatically engages directly beneath where the employee puts the mold. (Tr. 269; Jt. Ex. 4b.)

⁶ In *Stacey Mfg. Co., Inc.*, 10 BNA OSHC 1534 (No. 76-1656, 1982), the materials were not placed by hand and the Secretary only showed that it was “not impossible” to be injured. 10 BNA OSHC at 1537 (upholding a violation of § 1910.212(a)(3)(ii) but vacating the citation item related to § 1910.212(a)(1)). Also, not on point is the ALJ decision, *Metal Shredders, Inc.*, No. 90-2273, 1992 WL 73639 (O.S.H.R.C.A.L.J. March 23, 1992). (Resp’t Br. at 15.) In that case, employees occasionally removed guards for maintenance. 1992 WL 73639, at *5. On such occasions, employees only came within three feet of the unguarded parts. *Id.* Here, employees came much closer to moving parts and the gap in the Lexan shield was always present.

employees to amputation injuries.” (Jt. Ex. 1; Stip. D.) Respondent argues that Press 26 complied with the cited standard at the time of the accident. (Resp’t Br. at 12.) Alternatively, it argues that if there was a violation, it resulted from unpreventable employee misconduct.⁷ *Id.* at 23.

The cited standard requires employers to provide one or more methods of machine guarding: “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.” 29 C.F.R. § 1910.212(a)(1). Employers must protect workers from hazards associated with the point of operation as well as other machine hazards. *Gen. Elec. Co.*, 10 BNA OSHC 1687, 1690 (No. 77-4472, 1982); *Ladish*, 10 BNA OSHC at 1237 (guarding requirements apply to the moving parts of all types of industrial machinery). “Section 1910.212 is to be read as a whole and its provisions, particularly sections 1910.212(a)(1) and (a)(3)(ii), are to be construed together.” *Stacey*, 10 BNA OSHC at 1536.

As described above, to complete the assigned work at Press 26, the employee first assembled a mold and then manually placed it in the machine’s loading area. (Tr. 20-22, 28, 244.) A hook arm detects the mold and pushes it to where the machine applies heat and pressure. (Tr. 42, 85, 142-43, 269, 292.) The opening to this area was partially covered with a physical barrier the parties referred to as a Lexan shield. (Tr. 180, 223, 226.) This Lexan shield had a 3 1/8 inches by 4 3/4 inches opening to allow objects to go from the loading area into the press portion of the

⁷ Respondent also challenged the CO’s overall credibility because he suffered a workplace injury. (Resp’t Br. at 16 n.16.) This contention is rejected. Nothing in the CO’s conduct, testimony, or demeanor disclosed a bias toward Respondent. Regarding all relevant facts, his testimony was corroborated by other witnesses and physical evidence. The CO’s testimony was direct and credible.

machine.⁸ (Tr. 86-87, 136, 228; Jt. Ex. 7 at 6-8.) After the mold is in the press area, a swing arm comes down and reduces the size of the opening in the Lexan shield. (Tr. 179-80, 229; Jt. Ex. 7.) However, even when the swing arm is completely down, a gap of approximately two inches in height between the top of the swing arm and the bottom of the Lexan shield remains.⁹ (Tr. 229-30; Jt. Ex. 7.) And, because pressure starts being applied even before the swing arm is fully down, the total size of the opening is still a relevant consideration when determining whether there was an unguarded hazard in a machine area.¹⁰ (Jt. Ex. 4b.)

Respondent argues that this opening does not violate the standard because it was the same size as the mold employees placed in the loading area. (Resp't Br. at 12.) While it is accurate to say that the opening was about the size of a correctly constructed mold, if an employee mistakenly forgot part of the mold, there would be a greater difference between the mold and the end of the Lexan shield.¹¹ (Tr. 228, 252, 292-93.) Further, because heat and pressure started to be applied even before the swing arm is down, employees were still at risk if their hand was on the side of the mold rather than the top. (Jt. Ex. 4.) This is more than a theoretical possibility because an

⁸ While the size of the cutout remained constant, the space an employee could reach into or be pushed into decreased as the press moved down on top of the mold. (Jt. Ex. 4b.)

⁹ The injured employee indicated that he was instructed to rotate the mold after placing it in the loading area. (Tr. 25-26.) Whether he was required to rotate the mold does not impact the size of the opening in the Lexan shield, which is undisputed. (Jt. Ex. 7.) Even if the mold was not supposed to be rotated, the work still brought employees' hands close to moving parts and a pinch point. (Jt. Exs. 2, 4b.)

¹⁰ Despite this evidence, Respondent argues that there was no evidence about "an absence of guarding on Press 26." (Resp't Br. at 12.) Both the CO and the plant manager acknowledged the gap in the Lexan shield. (Tr. 94, 168, 229-30, 233; Jt. Ex. 2.)

¹¹ According to the plant manager, the mold that the injured employee loaded into Press 26 just prior to his injury was shorter than the typical mold. (Tr. 293.)

employee's hand did, in fact, get through the opening and into the press portion of the machine even with the mold present.¹² (Stip. G; Tr. 134, 137.)

Respondent also suggests that the hook arm was a form of guarding. (Resp't Br. at 7-8.) The hook arm allowed workers to push the mold into the loading area rather than directly into the press. (Tr. 269.) This somewhat reduced the distance between the worker and the most dangerous part of the machine but it arguably presented its own hazard because it engaged automatically when an employee placed a mold in the loading area, even if an employee maintained contact with the mold. (Tr. 216, 269.) Nor did the hook arm physically preclude access to a machine area. *See Gen. Elec.*, 10 BNA OSHC at 1690 (finding that the point of operation must have a physical guard that does not depend upon correct employee behavior).

Respondent seems to recognize that neither the hook arm nor the Lexan shield prevented an amputation.¹³ Still, it argues that there is no violation because the standard does not say that the guarding in place has to be effective. (Resp't Br. at 2, 10-12.) By its express terms, the standard requires the use of guarding that protects employees "in the machine area from hazards." 29 C.F.R. § 1910.212(a)(1). Although the standard permits various types of guarding, whatever method is

¹² The injured employee's testimony that he did not place his hand in the machine on purpose is credited. (Tr. 36.) The injured employee impressed me as a credible witness. He answered the questions presented at the hearing without hesitation and with candor, to the best of his recollection in light of the traumatic injury he experienced. Although the plant manager disputed the worker's account of how the injury occurred, the plant manager lacked direct knowledge of the incident and never talked with the injured employee about how the accident occurred. Rather, the plant manager believed that it was Respondent's Environmental, Health and Safety (EHS) Manager Michael Forte who talked with the injured employee. (Tr. 296, 299.) The plant manager's suggestion that the injured employee is a "liar" is unwarranted and rejected. (Tr. 303.)

¹³ Respondent's EHS Manager Forte acknowledged to the CO that Press 26's guarding was not effective. (Tr. 104, 141, 144, 278-79; Jt. Ex. 7.) Notably, Respondent failed to call the EHS Manager to rebut this or any other testimony, even though at the time of the hearing Mr. Forte remained employed as Respondent's EHS Manager. (Tr. 320-21.)

chosen must offer protection.¹⁴ *Hughes Bros.*, 6 BNA OSHC at 1833 (“Subsection (a)(1) clearly requires an employer to provide guarding devices that ‘protect’ his employees against machine hazards. Nothing in the standard suggests that employees may be left with only partial protection from machine hazards”); *True Drilling Co. v. Donovan*, 703 F.2d 1087, 1090 (9th Cir. 1983) (noting that the guarding must be “efficacious and safe”). Thus, the standard requires more than the mere presence of guarding.

The plant manager indicated that employees were trained to remove their hands after placing the mold in the loading area.¹⁵ (Tr. 183, 248, 257, 324.) But, even when adhering to company policy, employees operating Press 26 came close to the point of operation. (Tr. 27-28; Jt. Ex. 7.) The standard does not require an employee’s hands to actually be in the point of operation for guarding to be necessary. *Oberdorfer Indus.*, 20 BNA OSHC 1321, 1328 (No. 97-0469, 2003) (consol.) (finding exposure to a hazard and a violation of § 1910.212(a)(1) when employees had their hands three to eight inches from the unguarded parts); *Sheet Metal Specialty Co.*, 3 BNA OSHC 1104, 1105 (No. 5022, 1975) (finding exposure in connection with a violation of 29 C.F.R. § 1910.212(a)(3)(ii) when press brake operator positioned sheet in the die and held it within twelve inches of the point of operation). *Cf. Syntron, Inc.*, 11 BNA OSHC 1868 (No. 81-

¹⁴ In support of its argument that the cited standard does not address the efficacy of guards, Respondent cites a non-precedential decision, *Roberts Consolidated Industries, Inc.*, No. 80-2423, 1981 WL 19359 (O.S.H.R.C.A.L.J. March 24, 1981) (consolidated). (Resp’t Br. at 12.) This case does not support Respondent’s position that the Secretary had to show that the machine was “unguarded.” *Id.* Rather, it makes plain that the standard must be interpreted to: “effectuate and not hinder the statutory purpose of employee protection.” 1981 WL 19359, at *16, citing *Hughes Bros.*, 6 BNA OSHC 1830, 1833 (No. 12523, 1978). The judge ultimately concluded that in the case of one of the machines, the guarding “fully protected employees.” *Id.* Notably, employees were not required to push a container into the press at issue in *Roberts*. *Id.* Here, employees were required to load the mold next to an opening in the Lexan shield. (Tr. 25-28; Jt. Ex. 4b.) As the Commission held in *Hughes Brothers*, partial protection from hazards does not satisfy the standard’s requirements. 6 BNA OSHC at 1833.

¹⁵ As noted above, the injured employee had not yet completed his training. (Tr. 17.)

1491-S, 1984) (distance of one foot insufficient to show exposure in light of how the machine functions and is operated). Rather, the cited standard requires protection from hazards in the “machine area.” 29 C.F.R. § 1910.212(a)(1). Employees placed the molds on top of moving parts and close to an undisputed pinch point.¹⁶ (Jt. Exs. 2, 4b.)

Thus, the incomplete Lexan shield, even when combined with the machine’s other features and the Respondent’s policies (if they had been fully followed), did not provide employees with the required protection from a hazard in a machine area. (Tr. 29, 94, 99, 141; Jt. Ex. 7 at 6; Ex. R-1 at 3.) *See Riverdale Mills Corp.*, 29 F. App’x. 11 (1st Cir. 2002) (finding that employer’s failure to adequately guard the machine was demonstrated by an employee’s hand going into a machine). Accordingly, the Secretary established that the cited standard applies and that Respondent violated it.

Exposure

An employee was actually exposed to the hazard presented by the violation when Press 26 crushed his hand.¹⁷ (Tr. 134; Stip. G.) Even without the injury, the regular course of work brought employees extremely close to part of the machine that applied heat and could sever bones. (Tr. 22, 28; Jt. Exs. 2, 4b.) As noted above, once the employee placed the mold by hand into the loading

¹⁶ Neither *Rockwell International Corp.*, 9 BNA OSHC 1092 (No. 12740, 1980) nor *Auto Shred Recycling LLC*, 18 BNA OSHC 1515 (No. 97-2050, 1998) (ALJ) compels a different result. (Resp’t Br. at 13-14.) As a preliminary matter, *Rockwell* involved a violation of a different standard and was partially over-ruled by *George C. Christopher & Sons, Inc.*, 10 BNA OSHC 1436 (No. 76-647, 1982). Moreover, in *Rockwell* the moving parts were so slow that even if an employee directly entered the point of operation, the Secretary did not establish that there would be an injury. 9 BNA OSHC at 1097-98. Press 26 was not so forgiving. Nor is the non-precedential decision *Auto Shred* persuasive. There, the employee did not have to come close to moving parts and was injured as a result of circumventing the guarding present. 18 BNA OSHC at 1516. Press 26 had an incomplete Lexan shield and the work required close access to moving parts.

¹⁷ While the evidence showed only one injury on Press 26, this “does not preclude a finding of employee exposure.” *See Consol. Alum. Corp.*, 9 BNA OSHC 1144, 1156 (No. 77-1091, 1980).

area, the hook arm pushed it on to the next area of the machine. (Tr. 28, 141-42, 269; Jt. Ex. 4b) This occurred regardless of whether an employee was still touching the mold. (Tr. 142, 292.) Further, although the swing arm reduced the size of the opening, there was sufficient room between the top of the swing arm and the Lexan shield for a hand to pass into the machine's most dangerous part.¹⁸ (Jt. Exs. 2, 7, 4b.)

Respondent counters that its policies kept employees from being exposed to any hazard. (Resp't Br. at 18-20; Tr. 244-45, 248.) As a preliminary matter, there is no dispute that a critical aspect of Respondent's program was not being adhered to on the day of the incident—the injured employee worked the automatic press without direct supervision.¹⁹ (Tr. 29.) More importantly, even if the injured employee had been directly supervised, the cited standard does not permit guarding by work rules.²⁰ *Akron Brick and Block Co.*, 3 BNA OSHC 1876, 1877-78 (No. 4859, 1976) (work rules relating to the use of a safety switch and hook were not a method of guarding contemplated by § 1910.212(a)(1)); *Riverdale Mills Corp.*, 29 F. App'x. 11 (1st Cir. 2002)

¹⁸ Neither *South Dakota Beverly Enterprises, Inc.*, 21 BNA OSHC 1037 (No. 01-212, 2005) (consolidated), nor *Skydyne, Inc.*, 11 BNA OSHC 1753 (No. 80-5422, 1984), requires a different result. In *Beverly* there were no injuries and there was evidence that the lack of machine guarding did not present a hazard. 21 BNA OSHC at 1038-39. *Skydyne* differed legally, in that another standard was cited, and factually, because the press was operated manually and there was evidence that employees would not be able to get their hands into the machine. 11 BNA OSHC at 1755 Unlike *Skydyne* and *Beverly*, the record here includes details about how operations required employees to come near moving parts, including an ingoing nip point, as well as evidence of a serious injury. (Tr. 22, 28; Jt. Exs. 2, 4b.)

¹⁹ It is unclear how long or why the employee was left unsupervised. (Tr. 90.) The injured employee thought the trainer went to the restroom. (Tr. 29.) Respondent's internal accident report does not mention the trainer but indicates that the unit leader had stepped away to get something. (Jt. Ex. 3 at 1; Tr. 326.) Neither the trainer nor the injured employee's immediate supervisor, the unit leader, testified and Respondent did not offer any other evidence to explain the lack of supervision. (Tr. 325-26.)

²⁰ While not exhaustive, the standard provides examples of potentially acceptable guarding methods: "barrier guards, two-hand tripping devices, electronic safety devices." 29 C.F.R. § 1910.212(a)(1). Training and instruction are addressed by other standards.

(unpublished) (upholding a violation of § 1910.212(a) because the method of guarding was insufficient). “[T]he standard is plainly intended to eliminate danger from unsafe operating procedures, poor training, or employee inadvertence.” *Signode Corp.*, 4 BNA OSHC 1078, 1079 (No. 3527, 1976) (upholding a violation of § 1910.212(a)(1)).

Further, Respondent’s work rule referred specifically to the point of operation. But, the cited standard is not limited to point of operation hazards. *Gen. Elec.*, 10 BNA OSHC at 1690; *Ladish*, 10 BNA OSHC at 1237. It requires guarding of “machine areas.” 29 C.F.R. § 1910.210(a)(1). And, Respondent required an employee to place the mold on top of a sensor that engaged automatically and near a point of operation that was only partially guarded. (Tr. 24; Jt. Ex. 2; Ex. R-2.) Thus, even if the standard permitted employers to rely on employee behavior in lieu of guarding, Respondent’s instructions did nothing to lessen exposure in a machine area. (Tr. 22, 28.) *See S & G Packaging Co.*, 19 BNA OSHC 1503, 1508 (No. 98-1107, 2001) (finding work rules insufficient to show unpreventable employee misconduct in connection with a violation of § 1910.212(a)(1)); *Con Agra Flour Milling Co.*, 16 BNA OSHC 1137, 1150 (No. 88-1250, 1993) (guarding violation found where employees worked 1 to 1.5 feet away from unguarded moving parts), *partially rev’d on other grounds*, *Reich v. Con Agra Flour Mill Co.*, 25 F.3d 653 (8th Cir. 1994) (not reviewing the guarding violation).

Knowledge

The knowledge element requires a showing that the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *See e.g., Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The opening in the Lexan shield was plainly visible and should have been seen by multiple supervisors. (Jt. Ex. 2.) For example, a supervisor worked adjacent to the injured employee and another manager operated Press 26 himself. (Tr. 28,

92; Jt. Ex. 7 at 6.) *See Nordam Grp.*, 19 BNA OSHC 1413, 1417 (No. 99-0954, 2001) (finding knowledge when conditions were in plain view and supervisor was regularly in the area), *aff'd*, 37 F. App'x 959 (10th Cir. 2002) (unpublished); *MCC of Florida, Inc.*, 9 BNA OSHC 1895 (No. 15757, 1981) (same). In addition, the plant manager indicated that the machine was checked for maintenance, including the guarding, every six months. (Tr. 196-97, 201, 279, 284; Jt. Ex. 6.) This is sufficient to show actual or constructive knowledge of the violative condition.²¹ *See Am. Airlines, Inc.*, 17 BNA OSHC 1552, 1555 (No. 93-1817, 1996) (consolidated) (finding knowledge when conditions were in plain view and supervisory personnel were present).

Respondent also argues that it did not know that Press 26 was unsafe. (Resp't Br. at 21.) As a preliminary matter, the record does not support this statement. The machine was labeled with a caution sign, Respondent required training and supervision for its operation, and told employees not to put their hands in the press. (Tr. 35, 186, 189; Jt. Ex. 2.) More importantly, the Secretary does not need to show that the employer was actually aware that a condition violates the cited standard. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-80 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). Awareness of the condition itself satisfies the test. *Id.* Respondent had such awareness. It knew that Press 26 presented hazards and was aware of the

²¹ The open and obvious nature of the gap distinguishes the present matter from the ALJ decision relied on by Respondent, *Evergreen Technologies, Inc.*, 18 BNA OSHC 1528 (No. 98-0348, 1998) (ALJ). (Resp't Br. at 11, 14, 18-19.) In *Evergreen*, there was no dispute that the moving part required guarding but the Secretary failed to show that the Respondent knew, or should have known, that the necessary guarding had become detached. 18 BNA OSHC at 1529.

gap in the Lexan shield.²² (Jt. Ex. 2 at 1; Ex. R-1 at 3.) Further, the gap was obvious and therefore capable of being discovered by a reasonably diligent employer.²³ See *Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88-1720, 1993) (finding an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished).

Respondent failed to rebut any element of the Secretary's prima facie case. Respondent did not call the EHS Manager, the trainer who was supposed to be supervising the injured employee at the time of the incident, or the unit leader.²⁴ See *Well Solutions, Inc., Rig No. 30*, 17

²² Respondent offered a document titled Client Safety Evaluation, prepared by Adecco, that was part of the agreement under which Adecco supplied workers for Respondent's Facility. (Tr. 242; Ex. R-1.) It notes generally that there are many hazards associated with moving machinery parts and also specifically indicates that workers will not operate machines until after four weeks of on the job training with a supervisor. (Ex. R-1 at 3.) The document does not support Respondent's claim that it lacked knowledge of the violative condition. Further, even if Adecco had concluded that Press 26 was appropriately guarded and could be operated by an unsupervised worker just two weeks into his ninety-day training period, this would not impact Dentsply's own liability for the violation. The Commission has long held that legal duties for compliance with the Act cannot be contracted away to third parties. See, e.g., *Baker Tank Co.* 17 BNA OSHC 1177, 1179 (No. 90-1786-S, 1995).

²³ Nor is there any suggestion that the cited standard was invalidly promulgated or not published in the Code of Federal Regulation. See *Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Labor*, 674 F.2d 1177, 1186 (7th Cir. 1982) (construing machine guarding requirement as "sufficiently specific ... to reasonably apprise [the employer] in clear terms" of the conduct required); *Ralston Purina, Co.*, 7 BNA OSHC 1302, 1304 (No. 76-2551, 1979) (noting that the requirements of § 1910.212(a)(1) are "self-explanatory and clearly ascertainable"). Due process necessitates that the employer receive a "fair and reasonable warning; it does not demand that the employer be *actually aware* that the regulation is applicable" *Am. Bridge Co.*, 17 BNA OSHC 1169, 1172 (No. 92-0959, 1995) (emphasis in original).

²⁴ There is no evidence that any of these individuals were unavailable at the time of the hearing. (Tr. 278-79, 295, 306, 320-21, 325-26.) It is reasonable to infer that if Respondent's EHS Manager, the injured employee's trainer, or the injured employee's immediate supervisor, the unit leader, had information disputing the testimony of the Secretary's witnesses or rebutting the Secretary's prima facie case, Respondent would have called these individuals to testify. See *Capeway Roofing Sys. Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1986, 2003).

BNA OSHC 1211, 1214-15 (No. 91-340, 1995) (holding that the Secretary can rely on the “best available evidence” and even a slim showing of a prima facie case is sufficient absent rebuttal by the party who has “full possession of all the facts”); *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521-22 (No. 90-2866, 1993) (evidence cited by employer did not rebut Secretary’s evidence that hazard was accessible). There is no dispute that there was a gap in the Lexan shield, employees had access to this gap, and the incomplete guarding was, at least, capable of being discovered. (Jt. Ex. 2, 4b.)

Affirmative Defenses – Unpreventable Employee Misconduct

Having found that the Secretary established a violation, we turn to whether Respondent made out its affirmative defense of unpreventable employee misconduct.²⁵ To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has: (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. (Jt. Pre-Hr’g Report at 6.b.) *See, e.g., Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007) (employer lacked a rule regarding the selection of a proper respirator). With respect to the first element, Respondent points to its rule that employees must not put their hands in the machinery. (Resp’t Br. at 23; Jt. Ex. 3; Tr. 255-56.) The injured employee acknowledged that he was told not to put any body part in the machine and that violating safety rules could result in discipline. (Tr. 35.)

²⁵ Respondent raised this defense in its Answer, in accordance with Commission Rule 34(b)(3), which states that: “[t]he answer shall include all affirmative defenses being asserted.” 29 C.F.R. § 2200.34(b)(3). It did not raise any other affirmative defenses in its Answer, Pre-Hearing Statement, or at any other point.

While certainly relevant, Respondent’s rule about not placing body parts in machines must be viewed in the context of the specific violation as well as Respondent’s overall safety program. (Tr. 23-24.) The violation was for failure to guard operators against hazards in the machine area. (Complaint Ex. A.) No guard was removed or altered by an employee. The machine violated the cited standard without any action by an employee—the alleged violation of a work rule to stay out of a point of operation did not create the violative condition. *See PBR, Inc. v. Sec’y of Labor*, 643 F.2d 890, 895 (1st Cir. 1981) (warning employees to exercise caution is not a sufficient work rule to defend against a violation of § 1910.212(a)(1)). Nor does the rule “reflect the requirements” of the cited standard, which requires machine guarding. *Lake Erie Constr. Co., Inc.*, 21 BNA OSHC 1285, 1287 (No. 02-0520, 2005); *Little Beaver Ranches, Inc.*, 10 BNA OSHC 1806, 1811 (No. 77-2096, 1982) (requiring employees to have “nothing to do with power” and to “stay away from power lines” was an insufficient basis for the employee misconduct defense); *Power Plant Div., Brown & Root, Inc.*, 10 BNA OSHC 1837, 1840 (No. 77-2553, 1982) (requiring employees to tie off safety belts was a not a defense to a citation alleging that an open-sided floor lacked a guardrail). The cited standard prescribes physical guarding to protect against inadvertence. *Akron Brick and Block Co.*, 3 BNA OSHC 1876 (No. 4859, 1976); *Consol. Aluminum Corp.*, 9 BNA OSHC 1144, 1156 (No. 77-1901, 1980)(“warning signs and instructions to employees to avoid the hazards are not as a matter of law an adequate substitute for the physical guarding required by [§ 1910.212(a)(1)]”); *Special Metals Corp.*, 9 BNA OSHC 1132, 1134 (No. 76-4940, 1980) (“it is inappropriate to rely on employees to avoid a hazardous condition as the primary means of protecting employees from that condition”).

Respondent argues that the injured employee’s misconduct resulted in his loss of three fingers. (Resp’t Br. at 24.) First, the record does not support this assertion—Respondent did not

establish that the employee caused his own injury. Although the plant manager disputed the worker's account of how the injury occurred, he lacked any direct knowledge of the incident and never talked with the injured employee about what happened.²⁶ (Tr. 296, 299.)

Second, even if the employee erred, the unpreventable employee misconduct defense does not hinge on how an injury occurred. The focus is on whether the violation resulted from misconduct. That is not the case here. Instructing employees to avoid the point of operation on an automatic press is not a sufficient work rule to prevent the violation. (Tr. 111.) Third, there is no dispute that Respondent's supervision rule was not being followed when the incident occurred. The injured employee had been working at Dentsply for approximately two weeks and had only operated Press 26 for about a day when he was hurt.²⁷ (Tr. 38.) *See Marson Corp.*, 10 BNA OSHC 1660, 1662 (No. 78-3491, 1982) (rejecting unpreventable employee misconduct defense to a violation of § 1910.212(a)(1) in part because an employee was left unsupervised after initial training). Even though his training was ongoing, he was left unsupervised and exposed to a violative condition, which existed not as the result of any conduct engaged in by the injured

²⁶ In addition to disputing how the injury occurred, Respondent also tried to cast doubt on the injured employee's description of how to load the molds into Press 26. The injured employee believed he was to turn the mold after placing it in the loading area and said a supervisor saw him complete the task this way. (Tr. 25, 28.) The plant manager indicated that "at some point" turning the molds would result in a jam. (Tr. 244, 272.) But he conceded that the approach described by the injured employee did not violate the company's Machine Safe Guarding Policy. (Tr. 182-92, 273; Jt. Ex. 8; Ex. R-2.) And, because neither the trainer nor the direct supervisor testified, no witnesses with direct knowledge of how the injured employee's training actually occurred refuted his account of the instructions given. (Tr. 296, 325-26.) Thus, although the plant manager argued that the trainer would have stopped an employee from turning the molds, there is no direct evidence that this occurred. (Tr. 274.) *See Kaspar*, 16 BNA OSHC at 1521-22 (showing that improperly guarded equipment was unplugged and not in the work area did not rebut Secretary's evidence that hazard was accessible). In any event, the gap in the Lexan shield was present regardless of whether employees turned the molds in the loading area or not.

²⁷ As noted above, Dentsply had a ninety-day training period, which was to include thirty days of direct supervision. (Tr. 186, 191-92, 303; Ex. R-1 at 3.)

employee. (Tr. 29, 139, 186, 303-4.) *See Adams & Mulberry Corp.*, 3 BNA OSHC 1077, 1078 (No. 2548, 1975) (no employee misconduct defense when employees were inexperienced and exposure resulted from poor supervision); *Little Beaver*, 10 BNA OSHC at 1811 (heightened instruction requirement for inexperienced employees); *Lake Erie*, 21 BNA OSHC at 1287 (work rule must be “clearly and effectively communicated to employees”).

Particularly in light of the lack of an adequate work rule pertaining to the cited standard, Respondent failed to establish the affirmative defense of unpreventable employee misconduct.

Characterization and Penalty Amount

The Secretary characterizes this Citation item as serious. A violation is “serious” if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). The CO testified that there was a likelihood of serious harm and that multiple employees were exposed to the violative condition. (Tr. 98-99; Jt. Ex. 7 at 8.) Amputations of fingers are a serious bodily injury, making it appropriate to characterize the violation as serious. (Tr. 98-99.) See J.C. Watson Co., 22 BNA OSHC 1235, 1241 (No. 05-0175, 2008) (consolidated) (affirming a violation of § 1910.212(a)(1) as serious); Hughes Bros., 6 BNA OSHC at 1833 (finding that partial guarding does not preclude serious characterization of violation).

As for the penalty amount, the Act requires consideration of four factors: (1) the gravity of the violation; (2) the employer’s size; (3) the employer’s history; and (4) its good faith. Amerisig Se., Inc., 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996) (applying 29 U.S.C. 666(j) to assess the penalty for a violation of § 1910.212(a)(1)). Of these, gravity is generally the most important factor. Id.

The CO explained that the violation's gravity was high because of the severity of injuries that could occur. (Tr. 99.) The undersigned agrees and finds that the probability of an injury resulting from the violative condition increased because the employee was left unsupervised to work at Press 26 alone just a short way into his training period. (Tr. 29, 99.) See Amerisig, 17 BNA OSHC at 1661 (noting the severity of injuries a press machine can cause when it violates § 1910.212(a)(1)). The plant manager indicated that the company has approximately 700 employees and neither party argues that Respondent's size warrants a penalty reduction. (Tr. 323; Jt. Ex. 7 at 4; Ex. R-1.) As for history, although Respondent has not been previously cited, there was no evidence of past inspections either. So, Respondent's history warrants neither an increase nor a decrease in the penalty amount. See M.V.P. Piping Co., Inc., 24 BNA OSHC 1350, 1352 (No. 12-1233, 2014) (finding that history factor did not support a low penalty when the employer had not been inspected within the past five years). Finally, while Respondent exhibited some good faith by promptly addressing the lack of guarding, the undersigned finds that violation's gravity deserves more weight than this factor. (Stip. E.) See Amerisig, 17 BNA OSHC at 1661 (finding the gravity high despite the precautions taken). Therefore, a penalty of \$7,000 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is hereby ORDERED that Item 1 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1910.212(a)(1) is AFFIRMED, and a penalty of \$7,000 is assessed.

/s/ _____

Carol A. Baumerich
Judge, OSHRC

Dated: August 15, 2017