



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. : OSHRC Docket No. 00-1052
SIEMENS ENERGY & AUTOMATION, INC., :
Respondent. :

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

At issue before the Commission is whether Siemens Energy & Automation, Inc. (Siemens) violated 29 C.F.R. § 1910.217(e)(1)(i), which requires employers to establish and follow a periodic and regular press inspection program and to maintain certification records of its inspections.¹ Siemens operates 23 presses at its Urbana, Ohio, plant. The presses are used in metal stamping to manufacture components for electrical circuit breakers and switches. On May 2, 2000, a metal

¹ The standard states:

§ 1910.217 Mechanical power presses. ... (e) *Inspection, maintenance, and modification of presses.* (1) *Inspection and maintenance records.* (i) It shall be the responsibility of the employer to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment, and safeguards are in a safe operating condition and adjustment. The employer shall maintain a certification record of inspections which includes the date of inspection, the signature of the person who performed the inspection and the serial number, or other identifier, of the power press that was inspected.

piece from a Johnson OBI mechanical power press broke and struck a Siemens employee in the head and face.

After an inspection of the plant by James Washam, the machine guarding and lockout coordinator for Region V of the Occupational Safety and Health Administration (“OSHA”), the Secretary issued Siemens a citation alleging a serious violation of section 1910.217(e)(1)(i). The citation alleged that Siemens failed to conduct adequate press inspections to ensure that all press parts, auxiliary equipment, and safeguards were in safe operating condition and adjustment. According to the Secretary, Siemens should have inspected concealed areas of the press, such as “wear on friction discs; air brake linings, shoes, casting cracks; rotary limit switches, chains and sprockets; loose nuts, bolts, gib adjustment, flywheel bearings, ball nut adjustment, drive gears and keys, and additional items described in the maintenance manuals, such as for the Johnson OBI press.”² The Secretary proposed a penalty of \$5,000. Administrative Law Judge Ken S. Welsch affirmed the violation and assessed a penalty of \$3,000. For the reasons that follow, we affirm the violation.

Discussion

Siemens conducted and recorded its monthly press inspections based on a checklist designed by Siemens’ safety director, Rex Blevins, entitled “Mechanical Power Press Certification Record of Regular Inspection.” Neither the checklist nor the inspections involved an inspection of the parts identified in the citation or any other concealed press parts.

² In her amended complaint, the Secretary charged in the alternative a violation of section 1910.217(e)(1)(i) for Siemens’ failure to maintain a certification record of its inspections. The judge rejected the recordkeeping charge based on Washam’s acknowledgment that Siemens maintained press inspection records identifying the specific press, date of inspection, and signature of the inspector as required by the standard. On review, the Secretary does not dispute the judge’s finding that Siemens complied with the certification requirements.

In affirming the violation, the judge found that it was reasonable to require Siemens to inspect certain concealed parts in order to achieve compliance with the standard.³ Siemens argues, however, that the judge’s finding creates “additional” and “unique” requirements that are “beyond the plain words of the standard and any previous interpretation of the standard.” We disagree.

Section 1910.217(e)(1)(i) requires employers to establish a press inspection program that achieves the standard’s objective of ensuring that all press parts are in safe operating condition and adjustment.⁴ As a broad, performance-oriented standard, section 1910.217(e)(1)(i) provides employers with a certain degree of discretion in determining what type of inspection is appropriate to ensure that its program meets the standard’s stated objective. It does not identify each specific

³ As part of his analysis of section 1910.217(e)(1)(i), the judge sought to differentiate the obligations imposed under (i) from those imposed under (ii), noting the varying references to inspection, testing, and maintenance. Commissioner Stephens would disavow this portion of the judge’s analysis, since it fails to take into account the legislative history of this regulation including its derivation from §4.1.3, Inspection and Maintenance Records, of ANSI B11.1-1971 (the national consensus standard governing mechanical power presses adopted pursuant to §6(a) of the Act), and various revisions promulgated by the Secretary since 1974, such as the 1986 amendment. *E.g.*, Notice of Proposed Rulemaking, 51 Fed. Reg. 312, 312-13 (Jan. 3, 1986); Notice of Final Rulemaking, 51 Fed. Reg. 34,552, 34,558, 34,561 (Sept. 29, 1986). *See Martin v. American Cyanamid Co.*, 5 F.3d 140, 145 (6th Cir. 1993) (“preamble to a regulation may be consulted in determining the administrative construction and meaning of the regulation”).

⁴ Because the power press regulation specifies that inspections are to ensure “*all* their parts . . . are in safe operating condition and adjustment,” we think that Siemens hoists itself on its own petard by advancing a so-called “plain meaning” argument, for such an interpretation cannot ignore the term “all.” Yet, that is precisely what Siemens does here by interpreting the regulation as if it required inspection of only unconcealed parts. Significantly, not even the Secretary has embraced in this case a “plain meaning” view that all parts are to be individually inspected here. *See also* note 8, *infra*. In her post-hearing brief to the judge, the Secretary explained that she “is not seeking total disassembly of the press each month to go over every single part. OSHA is requesting that Siemens take covers off of concealed parts and use tools to check adjustment, as the manufacturer recommends, be it quarterly, semi-annually or annually.”

part of every type of mechanical press that must be inspected. Such broad standards may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry. *See Brooks Well Servicing, Inc.*, 20 BNA OSHC 1286, 1291, 2002 CCH OSHD ¶ 32,675, p. 51,475 (No. 99-0849, 2003); *American Bridge Co.*, 17 BNA OSHC 1169, 1172, 1993-95 CCH OSHD ¶ 30,731, p. 42,668 (No. 92-0959, 1995). Because “specific regulations cannot begin to cover all of the infinite variety of hazardous conditions [that] employees must face,” *Ray Evers Welding Co. v. OSAHRC*, 625 F.2d 726, 730 (6th Cir. 1980), “general regulations are not constitutionally infirm on due process grounds so long as a reasonableness requirement is read into them.” *W. G. Fairfield Co. v. OSHRC*, 285 F.3d 499, 507 (6th Cir. 2002). *See also Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1336 (6th Cir. 1978) (“due process clause does not impose drafting requirements of mathematical precision or impossible specificity”).

Applying these principles, we find that this record establishes that a reasonable employer in the metal stamping industry would have recognized a duty here to periodically inspect certain concealed press parts in order to comply with section 1910.217(e)(1)(i). Washam, the OSHA official in charge of the inspection and an expert witness in mechanical power press safety, testified that Siemens’ limited inspection of unconcealed press parts did not meet the standard’s objective. He pointed out that such inspections would not reveal the presence of deterioration, casting cracks, improper adjustment, and other problems associated with concealed parts that could, when left unchecked, lead to press failure. Siemens points to nothing in the record to dispute his expert testimony.

Washam’s testimony is corroborated by reports from World Press Repair (“World Press”), documenting the press inspections that World Press conducted

for Siemens six and a half weeks after the Johnson press accident.⁵ These reports identify a number of problems with the concealed parts that Siemens did not inspect, including missing brake springs and bolts; loose brake anchors; oily clutch brakes; and improper adjustments of gib clearances, ball box bushings, and slide parallelisms. Washam specifically testified that the problem of an improper gib adjustment, which World Press documented on all the presses, could, if left unchecked, create a casting crack leading to a breakage of a crankshaft or pitman screw and causing the entire press to collapse.

Under Siemens' reading of section 1910.217(e)(1)(i), an employer would be permitted to ignore serious latent defects – such as those revealed by the World Press inspections – that might arise in the cited concealed areas, and limit its inspections to only the visible parts of a press. This simplistic view of the standard's requirements ignores the complexity of a mechanical power press and the dangers associated with its operation. Siemens' claim that it lacked notice of any obligation under section 1910.217(e)(1)(i) to inspect the concealed parts of its presses is also without merit. Indeed, Siemens' safety director, Blevins, testified that he was aware of OSHA's CPL 2-1.24, *National Emphasis Program on Mechanical Power Presses*, when he developed Siemens' mechanical power press safety program. That instruction provides a sample checklist expressly stating that “[t]he employer is responsible for consulting the manufacturer's recommendations on each power press in operation and fully complying with the letter and intent of

⁵ While we do not rely on the post-citation World Press inspection reports as evidence of deficiencies in Siemens' press inspection program at the time of the citation, we find that the results of these reports do serve to corroborate Washam's testimony that Siemens' periodic inspections of only the visible parts of its presses failed to meet the compliance objective of the cited standard to ensure that all parts are in safe operating condition and adjustment.

1910.217(e).”⁶ The manufacturer’s manual for the press involved in the accident,

⁶ Siemens argues that the Secretary’s reliance upon a press manufacturer’s maintenance recommendations to explain the obligations under section 1910.217(e)(1)(i) should have been the subject of notice-and-comment rulemaking. However, the cases which Siemens cites, *Indian Head, Inc. v. Allied Tool & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987), and *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), are wholly inapposite. *Indian Head* involved the issue of whether the federal antitrust laws applied to efforts to influence the promulgation of a safety standard by a private standard-setting organization. Similarly, *American Society* involved the antitrust liability of a private, nonprofit organization for acts of its agents in connection with its safety standards-setting responsibilities. In any event, Siemens has not demonstrated how OSHA Instruction CPL 2-1.24, which suggests that an employer consult a manufacturer’s maintenance recommendations, constitutes a type of legislative rule that would require rulemaking. See *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 587-88 (D.C. Cir. 1997) (an interpretation that “spells out a duty fairly encompassed within the regulation” need not be promulgated through rulemaking); *American Mining Congress v. MSHA*, 995 F.2d 1106 (D.C. Cir. 1993).

The holdings of the authorities invoked by the dissent are as readily distinguishable as Siemens’ citations. *Usery v. Kennecott Copper Corp.* 577 F.2d 1113 (10th Cir. 1977), involved the OSHA standards governing guardrails on scaffolds, which had been adopted under section 6(a) from standards formulated by the American National Standards Institute. The court overturned the Secretary’s modification of what was advisory language in the ANSI standards into an affirmative duty, thus requiring greater compliance than could reasonably have been anticipated by the industry. In *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978), the court held that section 1910.212, which requires point of operation guarding on machines, did not fairly warn a manufacturer of its application to press brakes. However, the court stressed that this result flowed from a combination of several factors, including (1) unartful drafting of a related regulation that could be read as exempting press brakes from section 1910.212; (2) evidence of industry practice of rarely using press brake points of operation guarding; and (3) a pattern of ALJ decisions holding section 1910.212 inapplicable to press brakes.

the *Johnson OBI Power Press Operation and Maintenance Manual*, which the Secretary submitted into evidence, recommends periodic inspections of concealed parts, including all of those identified in the citation.⁷ A third publication, entitled *Inspection and Maintenance of Mechanical Power Presses*, by the National Safety Council (NSC), states that “to prevent costly accidents ... it is essential that the entire machine be inspected and that necessary adjustments be made periodically.” The NSC’s publication specifically recommends that inspections of concealed press parts, including those identified in the subject citation, be conducted periodically, with the frequency of inspection determined on the basis of usage, the type of press, or the type of associated critical equipment. Blevins even listed the NSC publication as a reference in Siemens’ written press safety program.

In the instant case, the Secretary indicated that to comply with section 1910.217(e) an employer should consult a power press manufacturer’s recommendations concerning inspection and maintenance. This is a far cry from the overreaching and confusion for which courts faulted the Secretary in the above precedents. By taking into account a manufacturer’s recommendations, she is not fundamentally altering the employer’s legal obligation to establish an inspection program that ensures the safe operation and adjustment of its power presses. Further, as the *Diebold* opinion carefully noted, couching a regulation in general terms is not necessarily fatal, for “generality is a necessary by-product of the broad scope of the subject matter and the nearly infinite variety of machines which might pose hazards of the sort within the rule’s coverage.” *Diebold*, 585 F.2d at 1336. Nor could it be concluded from this record that consulting a manufacturer’s recommendations was somehow alien or antithetical to industry practice, or a reversal of prior caselaw.

⁷ We are not persuaded by Siemens’ argument that “it would have been necessary to disassemble the press” in order to inspect concealed parts, specifically the ball seat area where the Johnson press failed. According to Washam, a proper inspection of this area, as described in the Johnson press manufacturer’s manual, involved removing the ball screw and ball nut from the ram, checking the ball nut for excess oil, and then, while tightening it back into place, “watch[ing] the clearance between the side of the nut and the pocket to see that the nut doesn’t tilt.” There is nothing in the manual’s description, or elsewhere in the record, to support Siemens’ contention that conducting a periodic inspection of concealed press parts, such as those listed in the citation, would require dismantling the press.

Under these circumstances, we cannot find that Siemens' press inspection program complies with the objective of this broad standard. Accordingly, we affirm the violation of section 1910.217(e)(1)(i).⁸

⁸ Our colleague misreads the language and meaning of the standard at issue and the applicable law.

The applicable standard requires “the employer to establish and follow a program of periodic and regular inspections of his power presses *to ensure that all their parts . . . are in a safe operating condition and adjustment.*” (Emphasis added). The standard is a performance-oriented standard that leaves some discretion to employers to determine *what* specific parts must be inspected to meet the performance objective of the standard. Thus, some parts may not require periodic inspections, as they may serve no functional purpose. The employer's exercise of discretion is judged by a reasonable person or “reasonably prudent employer” standard. *Ray Evers Welding Co. v. OSAHRC*, 625 F.2d 726, 731 (6th Cir. 1980). *See also supra* note 4.

In light of the governing case law, we are puzzled how our dissenting colleague could disagree with the notion that a reasonably prudent employer would consult the inspection recommendations in the manufacturer's manual. Surely this prophylactic, performance-oriented standard could not be read as providing an employer *carte blanche* to merely “devise their own press inspection programs,” no matter the content. A “reasonably prudent employer” would develop more than a “paper program.” *See Austin Commercial v OSHRC*, 610 F.2d 200 (5th Cir. 1979) (inspection requires careful and critical examination, not mere opportunity to view equipment).

Characterization and Penalty

Section 17(k), 29 U.S.C. § 666(k), of the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678, provides that a violation is serious

Our colleague also misreads applicable law in seeming to suggest either that (1) the Secretary's explanation of an employer's duty under this standard changes the terms of the standard and thus must be accomplished through rulemaking or (2) the Secretary lacks any interpretive powers with respect to this standard because she adopted it from an ANSI standard pursuant to section 6(a) of the Act and did not herself develop it under normal rulemaking. With respect to his first suggestion, *see* n. 6 *supra*. With respect to his second suggestion (and without even addressing the question of deference), an agency has the power to interpret a regulation because of the agency's role as the "sponsor of the regulation, not necessarily . . . its drafting expertise . . ." and because of the "agency's delegated authority to administer the statute . . ." *See Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d at 585. *See also Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 584 (D.C. Cir. 1985) (Secretary need not adopt a national consensus standard verbatim under shortened procedures of section 6(a); inquiry is whether Secretary effectuated a substantially meaningful modification of either the thrust of the regulation or the meaning which one in the employer's line of business would ascribe to the regulation).

Finally, the dissent's claim of an improper delegation of authority to private organizations by referencing manufacturer's maintenance recommendations is not supported by the cited case law. In *Towne Construction Co. v. OSHRC*, 847 F.2d 1187 (6th Cir. 1987), the court held that a regulation derived from a national consensus standard that requires an employer to abide by a crane manufacturer's load limitations was not an illegal delegation to private parties of the responsibility to set safety and health standards. Comparable to the court's assessment in *Towne Construction*, there is nothing in the instant record to show that the Secretary's interpretation is substantively unfair, or that it benefits a particular group at the expense of the employer, or that it creates any conflict of interest or any anticompetitive effect. *Id.* at 1190. In the other decision cited by the dissent, *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1096-1097, 1980 CCH OSHD ¶ 24,979, p.30,845 (No. 12470, 1980), the issue of improper delegation was not even presented. Insofar as these cases stand for the proposition that the Secretary cannot make substantive changes to a consensus standard in the absence of notice-and-comment rulemaking, as we explain above and in note 6 *supra*, we do not find the Secretary's interpretation constitutes a substantial modification of the regulation.

if there is a substantial probability that death or serious physical harm could result from the violation. It is undisputed that failing to conduct adequate press inspections could cause serious injury to operators. We therefore affirm the violation as serious.

The Secretary's proposed penalty of \$5,000 was based on high gravity for the type of injuries that could occur, such as amputations, with no reductions for size, good faith, or history in light of a previous inspection and serious citations for machine guarding more than three years prior to the subject citation.⁹ The judge assessed a lower penalty of \$3,000 based on high gravity with a credit for history and good faith. His credit for history was based on Siemens' lack of prior citations for several years prior to the subject violation. The good faith credit was based on Siemens' efforts to implement a regular and periodic press program, which, although inadequate, was characterized as "good" by Washam.¹⁰ The judge further credited Siemens' participation in OSHA's Voluntary Protection Program and noted that the evidence did not show that the deficiencies in Siemens' press inspection program were the cause of the Johnson press accident.

In assessing penalties, section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury. *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). We find Washam's undisputed

⁹ With regard to size, the record shows that Siemens is a large employer with approximately 350 employees at its Urbana plant.

¹⁰ Washam testified that Siemens' inspection program was good only to the extent that it showed that the press appeared to be functioning properly "at that particular moment," but that it "would not have caught any of the problems with the crankshaft or the bearings or the flywheel or the ram itself ... [or] bad parts that might fail."

testimony that an inadequate inspection program could result in serious injuries sufficient to warrant the judge's finding of high gravity. We also find no reason to disturb the judge's credit for history. In addition, the record supports the judge's finding that Siemens made some good faith efforts to establish and follow a regular and periodic inspection program. Therefore, we see no basis for modifying the judge's penalty assessment.

Order

The citation for a serious violation of 29 C.F.R § 1910.217(e)(1)(i) is affirmed and a penalty of \$3,000 is assessed.

SO ORDERED.

/s/ _____
James M. Stephens
Commissioner

/s/ _____
Thomasina V. Rogers
Commissioner

Dated: February 25, 2005

RAILTON, Chairman, Dissenting:

The essential error my colleagues commit is that they would amend the substantive requirements of section 1910.217(e)(1)(i) by interpreting the standard to include duties not found within the original version of the standard. They err because the standard was originally adopted by the Secretary under the authority granted by section 6(a) of the Occupational Safety and Health Act (“Act”), 29 U.S.C. 655(a). The Secretary was authorized by section 6(a) to adopt, *inter alia*, safety standards promulgated by consensus organizations like the American National Standards Institute (“ANSI”) without subjecting those standards to rulemaking under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, or the rulemaking provisions of section 6(b) of the Act, 29 U.S.C. 655(b). The price to be paid was that the Secretary could not substantively amend a standard adopted as an OSHA standard under section 6(a) of the Act. *See, e.g., Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978) (“*Diebold*”); *Usery v. Kennecott Copper Corp.* 577 F.2d 1113 (10th Cir. 1977). As the reviewing courts indicated, the Secretary could amend a standard in a substantive manner only by resorting to the rulemaking provisions of section 6(b).

Section 1910.217(e)(1)(i) was derived from ANSI B11.1-1971 and promulgated as a section 6(a) standard in 1971. The specific language adopted from the ANSI standard states as follows:

4.1.3 *Inspection and Maintenance Records.* It shall be the responsibility of the *employer* to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment and safeguards are in safe operating condition and adjustment. The employer shall maintain records of these inspections and the maintenance work performed.

The first sentence of this provision is precisely the language employed in the first sentence of section 1910.217(e)(1)(i). On its face, the ANSI standard states that inspections must ensure that “all...parts” of power presses are in safe operating condition and adjustment. The Secretary’s brief to the Commission argues that

this language means that parts that are hidden from view by covers are to be inspected. She also tells us that “[t]his case does not present the stark requirement that literally every nut and bolt of the press be taken apart.” Instead, she interprets section 1910.217(e)(1)(i), and therefore the ANSI standard, to require something less in the way of an inspection than “all...parts” of the press. She would have the employer remove covers to expose “*major* components” of its presses. But that is not what the original source ANSI standard said. Moreover, she fails to define what she means by the words “major components” other than by way of reference to her own compliance instruction, CPL 2-1.24, which was issued on February 27, 1997, almost twenty-six years after the ANSI standard was adopted.

According to the Secretary, OSHA issued the CPL to assist employers in complying with section 1910.217. The CPL states that an employer like Siemens “is responsible for consulting” the recommendations in the press manufacturer’s manual in order to determine the kind of inspections they must perform. Of course this requirement is not stated in the ANSI standard but, like a “major components inspection,” it imposes a substantive duty on the employer. In effect, the Secretary, with the majority’s approval, is interpreting section 1910.217 to require employers to comply with the recommendations set forth in press manufacturers’ manuals.¹¹ In doing this, the Secretary has exceeded her authority under the Act to improperly delegate the authority to set OSHA standards to private organizations by substantively changing the source ANSI standard without following the rulemaking provisions of section 6(b) of the Act. *See Towne Construction Co. v. OSHRC*, 847 F.2d 1187 (6th Cir. 1987) (permissible delegation where manufacturer’s requirements reflect without modification the “national consensus standard” that Congress authorized the Secretary to adopt

¹¹ The Secretary specifically referenced the press manufacturer’s manual in the citation by listing a number of press parts that Siemens should have inspected, including, “additional items described in the maintenance manuals, such as, for the Johnson OBI press.”

under 6a); *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1096-1097, 1980 CCH OSHD ¶ 24,979, p.30, 845 (No. 12470, 1980), citing *Deering Milliken, Inc. v. OSAHRC*, 630 F.2d 1094 (5th Cir.1980) (substantive changes to national consensus standards require formal rulemaking procedures).

Remarkably enough, the Secretary has had two opportunities to amend section 1910.217 to include the substantive requirements she seeks to impose here - that employers must consult press manufacturer's manuals and inspect major press components in order to meet the compliance objective of the standard. She held rulemakings to amend the standard in both 1974 and 1986, *see* 39 Fed. Reg. 41841 (1974); 51 Fed. Reg. 34,552 (1986), but failed to address these issues on either occasion. The Commission should not substitute its interpretation of the standard to make up for the Secretary's failure to engage in rulemaking. That, however, is precisely what my colleagues have done.

Looking at the original source ANSI standard provides guidance to what its authors intended under section 4.1.3. An explanatory paragraph adjacent to the standard states:

To meet the requirements of this section, it is recommended that a visual inspection of operations, safeguards and auxiliary equipment be made at least once per shift. At weekly, or perhaps monthly intervals, each machine should be examined, and so indicated on individual press forms. Some machine features may require even less frequent attention.

Nothing is said about being responsible for consulting the manufacturer's instructions to determine what should be inspected nor are any "major components" identified. The explanation is vague and moreover it is precatory. It does not even command the employer to make inspections but only "recommends" that they be performed. It also does not command that weekly "or perhaps monthly" inspections be performed but only that they "should" be performed.

What may be gleaned from the explanation ANSI provided is that its authors did not mean that employers must inspect "all...parts" of their presses. To

that extent I would agree that the “stark requirement” mentioned by the Secretary must be rejected. However, that leaves us with a standard that appears to let employers devise their own press inspection programs, which is precisely what Siemens did. Indeed, the Secretary must have had the same belief for almost 26 years from when she adopted the ANSI standard until she issued the CPL.

I must add, given the vague nature of the ANSI standard and of section 1910.217(e)(1)(i), this employer cannot be said to have had notice that it should do more than it did when inspecting its presses. *See, e.g., Diebold*, 585 F.2d at 1335-1339 (due process requires that regulations provide “an adequate warning of what they command or forbid”). Siemens established and followed a program of periodic press inspections. It had its corporate safety director design a press inspection checklist, and it hired an outside consultant to conduct monthly inspections of each press. Siemens’ program complied with the literal requirements of the ANSI standard, and it therefore complied with the requirements of the OSHA standard. I would vacate the citation on this ground as well.

/s/ _____
W. Scott Railton
Chairman

Dated: February 25, 2005

Secretary of Labor,

Complainant,

v.

Siemens Energy & Automation, Inc.

Respondent.

OSHRC Docket No. **00-1052**

APPEARANCES

Janice L. Thompson, Esq.
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Robert A. Minor, Esq.
Vorys, Sater, Seymour & Pease, LLP
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Siemens Energy and Automation, Inc. (SEA), manufactures parts and components for electrical circuit breakers and disconnect switches at a plant in Urbana, Ohio, for assembly at another plant. On May 2, 2000, the metal casting on the slide of the Johnson OBI power press broke apart, causing serious head lacerations and contusions to the operator. After an inspection of SEA's power press program by the Occupational Safety and Health Administration (OSHA), SEA received a serious citation on May 12, 2000. SEA timely contested the citation.

The citation alleges that SEA violated 29 C.F.R. § 1910.217(e)(1)(i) for failing to adequately perform periodic and regular inspections of its mechanical power presses at the Urbana plant. The citation was amended to plead in the alternative that SEA failed to maintain proper certified records of press inspections as also required by 29 C.F.R. § 1910.217(e)(1)(i). The citation proposes a penalty of \$5,000.

The hearing was held on March 29-30, 2001, in Columbus, Ohio. The parties stipulated jurisdiction and coverage (Tr. 5). The parties filed post-hearing briefs.

SEA denies the alleged violation and asserts that its monthly press inspection program complied with the requirements of § 1910.217(e)(1)(i).

For the reasons discussed, a serious violation of § 1910.217(e)(1)(i) for failing to conduct adequate press inspections is affirmed and a penalty of \$3,000 is assessed.

The Inspection

SEA is a large manufacturing company with a plant in Urbana, Ohio. The Urbana plant makes parts and components for electrical circuit breakers and electrical disconnect switches assembled at a plant in Bellefontaine, Ohio. SEA employs approximately 75,000 employees nationwide. The Urbana plant has approximately 350 employees. The safety director for the Urbana plant is Rex Blevins, a former OSHA compliance officer (Tr. 17, 114-115). Between 1991 to 1995, Blevins had been a compliance officer with OSHA (Tr. 16, 340).

The Urbana plant has approximately 23 presses used to stamp metal and mold plastic. There are approximately 25 press operators working the plant's two shifts (Tr. 17, 116). Ninety percent of the presses are manufactured by Minster or Bliss. There is only one Johnson OBI press manufactured by South Bend (Tr. 34, 41, 117).

Upon starting work with SEA in 1995, safety director Blevins developed a monthly press inspection program for the Urbana plant (Exh. C-1, pp. 13; Tr. 16, 344). In developing the inspection program and an inspection checklist, Blevins consulted a variety of sources including the OSHA's National Emphasis Program On Mechanical Power Presses, CPL 2.1-24, dated February 27, 1997 (Exh. C-6; Tr. 32). The inspection program began in 1997 (Tr. 36).

SEA contracted Joseph Hammond, a private safety consultant, to conduct the monthly press inspections. Hammond observed each press in accordance with the checklist developed by Blevins and was generally accompanied by SEA repairman John Howell. While Hammond observed the press, Howell operated the controls and cycled the press. Hammond spent less than 15 minutes at each press and recorded his observations on the checklist (Exhs. C-15, R-1; Tr. 215, 349, 385-390). Hammond took no measurements, used no tools, and did not remove any covers from the press while conducting his inspections.

On May 2, 2000, press operator Melody Gatchel was working at the Johnson OBI press when the metal casting on the slide at the ball seat failed, breaking loose, and striking her in the

head and face (Exhs. C-8, C-10; Tr. 234-235). She has not returned to work (Tr. 39). SEA described the cause as metal fatigue (Exh. C-8). Testing by an outside company of the press determined that a prior stress fracture had given way (Tr. 236).

After receiving a complaint about the accident, OSHA Region IV machine guarding/lockout coordinator James Washam inspected SEA's press program on May 3, 2000 (Exh. C-18). Washam decided that SEA's monthly press inspections were inadequate and recommended the citation.

Discussion

The Secretary has the burden of proving a violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

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

SEA does not dispute that its presses at the Urbana plant are mechanical power presses within the application of § 1910.217(e)(1)(i). SEA also does not dispute that it knew of the requirements for regular and periodic inspections of mechanical power presses and that press operators were exposed to a hazard if the presses were not inspected.

OSHA does not dispute that SEA's monthly inspections were regular and periodic and that Hammond was qualified to conduct the inspections (Tr. 246, 319).

The issue in dispute is whether SEA's monthly press inspections were adequate. OSHA maintains that as part of Hammond's inspection, covers need to be removed and measurements made in order to check all parts.

Alleged Violation of § 1910.217(e)(1)(i)

The citation alleges that SEA's mechanical power press inspection program was not adequate because it failed to include items such as wear on friction discs, air brake linings, shoes,

casting cracks, rotary limit switches, chains and sprockets, loose nuts, bolts, gib adjustments, flywheel bearings, ball nut adjustments, drive gears and keys and additional items described in the maintenance manuals. In the alternative, the citation, as amended, also alleges that such items were not recorded on SEA's certified record of inspections.¹ Section 1910.217(e)(1)(i) provides

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

The issue in dispute is whether SEA's press inspections were adequate to comply with the requirement of § 1910.217(e)(1)(i) "to ensure that all their parts, auxiliary equipment, and safeguards are in safe operating condition and adjustment." SEA's monthly press inspections involved observing each press and testing the stopping and cycling functions of the press. It did not involve removing covers or taking measurements.

SEA argues that OSHA is requiring SEA to be held to a standard beyond the plain meaning of § 1910.217(e)(1)(i). SEA argues that § 1910.217(e)(1)(i) does not require removing covers to check a part's condition (Tr. 257-258). SEA maintains that OSHA is imposing an additional obligation to check the condition of the press for troubleshooting or maintenance which is imposed by § 1910.217(e)(1)(ii) but not by § 1910.217(e)(1)(i). SEA's safety consultants Hammond and Robert Brockmeyer testified that they knew of no companies who inspected presses in the manner suggested by OSHA (Tr. 384, 413-414).

Although Washam considered SEA's inspection "good," he did not think it went far enough because Hammond's inspection did not include the parts of the press not readily visible from walking around the press (Tr. 317). While Hammond visibly inspected the parts on SEA's checklist, repairman John Howell cycled the press. Hammond did not remove covers, use wrenches or other tools, or take measurements. Hammond recorded his observations as

¹OSHA's alternative allegation is rejected. OSHA inspector Washam conceded that SEA's certification inspection records identified the press, date of inspection and contained the signature of Hammond as required by § 1910.217(e)(1)(i) (Exhs. R-1, C-15; Tr. 285-286). Therefore, SEA complied with certification requirements.

“satisfactory” or “unsatisfactory” on the checklist. After completing the inspection, Hammond signed the checklist (Exh. C-15). Each inspection of the 23 presses took from five to fifteen minutes (Tr. 67, 164, 215). SEA agrees that the parts identified in OSHA’s citation (wear on friction discs, air brake linings, shoes, casting cracks, rotary limit switches, chains, sprockets, loose nuts, bolts, gib adjustment, flywheel bearings, ball nut adjustment, drive gears and keys) were not specific items on the SEA checklist. Also, the parts were not inspected if concealed nor were they measured to ensure adjustment (Tr. 71-72, 75-82, 169-177, 219-221, 223-227). Washam testified that the press parts listed in the citation were taken from the Johnson OBI Power Press Operation and Maintenance Manual² (Exh. C-7; Tr. 245-246).

In determining compliance with § 1910.217(e)(1)(i), it is noted that there are no OSHA interpretative bulletins and the standards do not define “inspection” (Tr. 293-294, 317-318). Also, decisions by Commission judges provide little guidance as to the scope of the inspection envisioned by § 1910.217(e)(1)(i). *Broward Hurricane Panel Co.*, 6 BNA OSHC 1307, 1308 (No. 77-0677, 1977) (Judge Burroughs found that the employer’s inspection and testing before each use of mechanical power presses that operated on a sporadic basis substantially complies with requirements as to frequency of inspection and testing); *Spaulding Lighting, Inc.*, 13 BNA OSHC 1412 (No. 86-1193, 1987) (Judge Sparks vacated a failure to abate citation because the employer conducted weekly inspections of the clutch, brake mechanism, anti-repeat feature and single slide mechanism which, although not as extensive as requirements of § 1910.217(e)(1)(i), complied with the parties’ earlier settlement agreement); *Turnbull Metal Products Co., Inc.*, 18 BNA OSHC 1555, 1558 (No. 96-1463, 1998) (Judge Welsch affirmed a violation of § 1910.217(e)(1)(i) because employer’s lack of inspection was shown by the number of items on presses found in disrepair and the employer’s checklist did not identify the parts inspected); and *SK Wellman Friction Co.*, 18 BNA OSHC 1878, 1882 (No. 98-648, 1999) (Judge Cook observed that the set up man’s inspections were not periodic, not documented, and were done incidental to other work).

Therefore, to determine compliance with standards such as § 1910.217(e)(1)(i), the Review Commission interprets such broad standards in light of the conduct to which it is being applied and external objective criteria, including the knowledge and perceptions of a reasonable

²The violation relates to all of the presses, not just the Johnson OBI.

person, is used to give it meaning. *American Bridge Company*, 17 BNA OSHC 1169, 1172 (No. 92-0959, 1995). The wording is construed in a reasonable manner consistent with a common sense understanding. The words are viewed in context, not in isolation. *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991). The standard must be interpreted as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same standard inconsistent, meaningless, or superfluous. *Boise Cascade Corp. v U. S. Environmental Protection Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991). It is not necessary to impose drafting requirements of mathematical precision or impossible specificity. *Ormet, supra*, at 2135. The Secretary's reasonable interpretation is entitled to substantial deference. However, employers are entitled to fair warning of what a standard requires.

Section 1910.217(e) is entitled "*inspection, maintenance, and modification of presses.*" Section 1910.217(e)(1)(i) requires regular and periodic inspections of presses. The standards do not define what constitutes an inspection. Also, the cited standard does not involve requirements for maintenance or modification of presses. Such requirements are provided in subsequent subsections of § 1910.217(e)(1). Also, the cited standard does not require testing. Otherwise, the Secretary would have included testing in the standard like she did in § 1910.217(e)(1)(ii). "[W]here a term is carefully employed in one place and excluded in another, it should not be implied where excluded." *Diamond Roofing Co., Inc. v OSHRC*, 528 F.2d 645, 648 (5th Cir. 1976).

In contrast to the cited standard, § 1910.217(e)(1)(ii) requires, in part:

Each press shall be inspected and tested no less than weekly to determine the condition of the clutch/brake mechanism, anti-repeat feature and single stroke mechanism. Necessary maintenance or repair or both shall be performed and completed before the press is operated.

The presses at SEA are equipped with control reliability systems and brake system monitoring which exempts them from the requirement of § 1910.217(e)(1)(ii) (Tr. 22). However, the standard's language demonstrates the difference between an inspection designed to ensure that parts, auxiliary equipment and safeguards are in safe operating condition under § 1910.217(e)(1)(i) and an inspection designed to determine the "condition of the clutch/brake

mechanism, anti-repeat feature and single stroke mechanism under § 1910.217(e)(1)(ii) (Tr. 323-325).

It is reasonable to conclude that “inspection,” as used in § 1910.217(e)(1)(i), does not require testing, maintenance, or modifications; although it is also reasonable to imply that defects found during any inspection be corrected when found. According to the dictionary, an inspection means “to view closely in critical appraisal: look over, to examine officially.” *Webster’s Seventh New Collegiate Dictionary*.

An inspection as contemplated by § 1910.217(e)(1)(i) involves visible observations. Section 1910.217(e)(1)(i) is stated in the present tense. The purpose of the periodic press inspection is “to ensure that all their parts, auxiliary equipment, and safeguards are in safe operating condition and adjustment.” The standard contemplates an inspection sufficient to check if all parts and safeguards are in safe operation and adjustment.

In order to accomplish the periodic inspection, it is reasonable to require that covers be removed and measurements made to ensure that all parts are free of visible wear or cracks and are in proper adjustment. Cycling the press does not disclose the possibility of worn, cracked, loose or out-of-adjustment parts which may be discovered during a visual inspection. To assist employers in implementing a press inspection program, OSHA issued OSHA instruction CPL 2-1.24 on February 27, 1997, and attached a sample inspection checklist (Exh. C-6). The sample checklist identifies for inspection the components common to most presses. Also, the checklist advises the employer that it is responsible for consulting the manufacturer’s recommendations because of the differences between presses. The manufacturer’s recommendations must be used because there are numerous press manufacturers of different presses (Tr. 252). At SEA, the 23 presses were manufactured by South Bend, Minster and Bliss. Safety Director Blevins acknowledges knowing of the CPL when he implemented SEA’s inspection program.

Based on a review of the record, SEA’s inspection program was inadequate. Without removing covers, SEA’s press inspection program did not inspect “all their parts” for safe operation and adjustment. The standard uses the term “all parts” to describe the scope of the visual inspection. As stated by OSHA inspector Washam, “[T]he fact that it’s operating today just through a visual observation operational test, it does not tell you if we’ve got some bad parts that might fail” (Tr. 241-242). SEA safety director Blevins conceded that Hammond’s visible inspection could not verify the proper adjustments of the parts such as the gib slide. However, he

stated that too much oil was a way of checking gib adjustment (Tr. 78, 88). Washam testified that at the point there is too much oil, a press could be far out of adjustment and a problem already created (Tr. 424). According to Washam, an employer who follows the manufacturer's recommendations would be in compliance (Tr. 300).

As evidence of deficiencies in SEA's press inspection program, World Press Repair Co. inspected all of SEA's presses on June 27, 2000 (Exh. C-16; Tr. 355). World Press was asked by SEA to check the gib adjustments and clearances, the slide parallelism and the clutch brake mechanism. The report by World Press found problems, such as four missing clutch springs, which should have been detected during SEA's periodic inspection. Howell agreed that the broken springs should have been found during Hammond's inspection (Tr. 182, 186). Hammond testified that he would check for missing or broken springs if they were visible. However, most of the springs are contained under the flywheel cover (Tr. 398). Hammond agreed that missing springs could have existed "for awhile" (Tr. 400). World Press Repair also found, among other things, gib adjustments out of clearance, brakes very oily, ball box bushings needing adjustment, and clutch pins needing replacement (Exh. C-16; Tr. 265-266). Prior to the accident, SEA's prior inspection was on April 25, 2000 (Exh. C-15).

OSHA's interpretation that SEA remove covers and check adjustments as part of its periodic press inspection program is reasonable "to ensure that all their parts, auxiliary equipment, and safeguards are in safe operating condition and adjustment." A violation of § 1910.217(e)(1)(i) is established.

Serious Classification

The violation of § 1910.217(e)(1)(i) was serious. A violation is serious under § 17(k) of the Act (29 U.S.C. § 666(k)), if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. The issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

SEA does not dispute that failing to conduct proper press inspections could cause serious injury to operators. Although the cause of the May 2 accident was not shown to be the result of

an inadequate inspection, it does show the hazards associated with working with mechanical power presses. The World Press Repair Co. report found that 22 of SEA's 23 presses required repair and/or adjustment (Exh. C-16).

Knowledge of the condition is shown by SEA's awareness of the need for periodic press inspections. The knowledge element is directed to the physical conditions that constitute a violation, and the Secretary need not show that the employer understood or acknowledged that the physical conditions were actually hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) *aff'd. without published opinion*, 79 F.3d 1146 (5th Cir. 1996). SEA was aware that its inspections did not check all parts, as required by § 1910.217(e)(1)(i). There does not need to be a showing that SEA knew that it violated the standard.

Penalty Consideration

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

SEA is a large employer with approximately 350 employees at the Urbana plant. The Secretary failed to give SEA credit for history. However, the record shows that SEA had not received a previous citation since 1995 (Tr. 279-280, 286). SEA, therefore, is entitled to credit for history. Also, SEA is entitled to good faith credit. SEA did implement a regular and periodic press inspection program which OSHA inspector Washam considered good. Although not adequate, SEA attempted to comply. The May 2 accident was not shown to be the result of deficiencies in SEA's press inspection program. Also, SEA is in OSHA's Voluntary Protection Program (Tr. 364-365).

A penalty of \$3,000 is reasonable for violation of § 1910.217(e)(1)(i). Although SEA conducted monthly inspections of all presses, the inspections failed to adequately inspect all parts to ensure safe operating conditions and adjustments. The Urbana plant has approximately 23 presses and 25 press operators. The program was developed by Blevins, a former OSHA compliance officer, and Brockmeyer, who has trained compliance officers (Tr. 405-406).

Brockmeyer characterized SEA's press inspection program as above average (Tr. 413). The inspections were performed by Hammond who the CO described as well qualified.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Citation No. 1, Item 1, alleged serious violation of § 1910.217(e)(1)(i) is affirmed and a penalty of \$3,000 is assessed.

/s/

KEN S. WELSCH
Judge

Date: December 14, 2001