

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Automated Handling & Metalfab, Inc.,

Respondent.

OSHRC Docket No. 07-1763

Appearances:

Elizabeth Ashley, Esq., Office of the Solicitor, U. S. Dept. Of Labor, Cleveland, Ohio
For Complainant

Jeffery Miller, *pro se*, Perrysburg, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Automated Handling & Metalfab, Inc. (AHM), is a steel fabrication shop owned and operated by Jeffrey Miller in Perrysburg, Ohio. The Toledo area office of the Occupational Safety and Health Administration (OSHA) received a complaint regarding AHM's shop (Exh. C-1). OSHA assigned compliance officer Darin VonLehmden to investigate the complaint. On May 18, 2007, VonLehmden and his team leader Gary Lescallett inspected AHM's shop, and on October 4, 2007, the Secretary issued two citations to AHM resulting from that inspection.

Citation No. 1 charges AHM with violations of nine safety standards of the Occupational Safety and Health Act of 1970 (Act):

Item 1—§ 1910.178(a)(4), for making modifications or additions to powered industrial trucks without the manufacturers prior written approval;

Item 2—§ 1910.178(a)(5), for not properly marking a fork truck to identify non-factory installed attachments;

Item 3—§ 1910.178(p)(1), for not taking an unsafe powered industrial truck out of service;

Item 4—§ 1910.212(a)(1), for not providing machine guarding for a foot treadle on a press brake;

Item 5—§ 1910.212(a)(3)(ii), for not guarding the point of operation on an HTC press brake;

Item 6—§ 1910.243(c)(3), for not providing a guard on an abrasive wheel used as a portable grinder;

Item 7—§ 1910.254(d)(9)(iii), for not replacing cables with damaged insulation;

Item 8—§ 1910.305(b)(2), for not providing an electrical panel with a cover; and

Item 9—§ 1910.305(g)(1)(i), for using flexible cords not approved for conditions of use and location.

Citation No. 2 alleges AHM committed a repeat violation of § 1910.212(a)(3)(ii) by not guarding the point of operation on a machine's punching station.

AHM timely contested the citations and penalties. The undersigned held a hearing in this matter on April 16, 2008, in Toledo, Ohio. Owner Jeffery Miller represented AHM *pro se* (Tr. 4). The parties stipulated jurisdiction and coverage. At the hearing, the Secretary withdrew items 1 and 4 of Citation No. 1 (Tr. 5). The Secretary has filed a post-hearing brief. AHM has not filed a brief.

For the reasons discussed more fully below, the undersigned affirms items 2, 3, 5, 6, 7, 8, and 9 of Citation No. 1 and item 1 of Citation No. 2. The total penalty assessed for both citations is \$7,100.00.

Background

AHM's fabrication shop is located on West Boundary in Perrysburg, Ohio. It is approximately 8,000 to 10,000 square feet and dates from the late 1970s or early 1980s (Tr. 107). AHM's shop foreman is Robert John (R. J.) Parker, who had worked for AHM for 10 years at the time of the hearing (Tr. 115).

On May 18, 2007, VonLehmden and Lescallett arrived at AHM's shop to conduct the inspection. They first met with AHM purchasing manager Eric Lause, who contacted owner Jeffery Miller by telephone (Tr. 14-16). VonLehmden and Lescallett conducted the walkaround inspection, accompanied by Lause, and later were joined by Parker (Tr. 21).

Citation No. 1

The Secretary has the burden of proving the violations by a preponderance of the evidence.

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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

It is undisputed that the cited standards apply to AHM's facility. Shop foreman Parker knew of all the alleged violative conditions. "When a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proving knowledge without having to demonstrate any inadequacy in the employer's safety program." *Superior Electric Co.*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996). Parker's knowledge is imputed to AHM. As discussed more specifically with each item, AHM's consistent lack of concern to enforce safety requirements made the violative conduct of the supervisor and the employees foreseeable.

AHM concedes it violated the terms of most of the cited standards, and mounts half-hearted defenses for the other ones. Its primary concern is with the amount of the proposed penalties.

Item 2: Alleged Violation of § 1910.178(a)(5)

The Secretary alleges AHM violated § 1910.178(a)(5), which provides:

If the truck is equipped with front-end attachments other than factory installed attachments, the user shall request that the truck be marked to identify the attachments and show the approximate weight of the truck and attachment combination at maximum elevation with load laterally centered.

VonLehmden observed a Komatsu fork truck equipped with a fork extension attachment. The attachment slips over the existing forks of the truck and is secured in place with bolts (Exhs. C-8 & C-9; Tr. 26-27). Miller testified that Michael Overmeyer, a professional engineer, designed the fork extension (Tr. 171). AHM's shop does not have a loading dock, so it modified the attachment to access shipments coming off trucks (Tr. 28). AHM was using the fork extension when Parker was hired, approximately 10 years before the hearing (Tr. 114, 127). AHM used the fork truck with the fork extension approximately once a week (Tr. 31).

The only data plate on the truck provided the maximum height and lift capabilities for factory-installed forks, not for the extension designed in-house (Tr. 25, 27). The length of AHM's attachment doubles the length of the original forks on the truck (Tr. 28). AHM did not place a plate or other label with the required information on the truck (Tr. 29-30).

Parker testified AHM's fork operators never pick up a load weighing more than 600 pounds (Tr. 124). He stated, "Everyone is advised on the operation of the forklift and what its capacity is, and they know not to pick anything up that isn't the same capacity as the forklift. It's not feasible" (Tr. 126).

AHM is not free to substitute verbal instructions to its employees for the standard's requirement that the truck be marked with the extension's capacity. Without the information on the data plate, an operator of the fork truck would not have sure knowledge of the maximum load capacity of the truck with the fork extension attached (Tr. 29). The hazard created by AHM's failure to post the required information on the truck is the operator could attempt to lift a load beyond the fork extension's capacity, causing the truck to tip over or drop its load. Either situation exposes the operator, as well as employees in proximity to the truck, to the risk of injury or death (Tr. 30).

The Secretary has established a serious violation of § 1910.178(a)(5).

Item 3: Alleged Violation of § 1910.178(p)(1)

The Secretary alleges AHM committed a serious violation of § 1910.178(p)(1), which provides:

If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

AHM has two powered industrial trucks at its facility. The Komatsu FG-35S-4 did not have a functioning horn, and the cable for its parking brake was broken. At VonLehmden's request, Parker tested the horn and parking brake; neither worked. The broken parking cable created the hazard the truck could roll if parked on an incline. It also removed the possibility the operator could use the parking brake as an emergency brake, should the need arrive (Exh. C-10, C-11; Tr. 35-36). The Hyster S-50-XL also had a non-functioning horn (Exh. C-12). The non-functioning horns created a hazard in the event the trucks' operators needed to alert employees of the trucks'

movements. The lighting in the facility was dim, which increased the need for audible alerts (Tr. 36).

The Hyster was also missing both locking pins for its fork attachment (Exh. C-13; Tr. 37). The locking pins prevent the fork attachment from moving laterally on the mast structure of the forklift and falling off (Tr. 38). Without locking pins, the fork attachment could shift and the load could drop, injuring employees in proximity to the truck (Tr. 39).

Parker was aware of the deficiencies in both trucks. Employees had operated both trucks recently; neither truck had been removed from service (Tr. 39-41). Parker told VonLehmden the AHM had been using the trucks in their violative condition “for some time” (Tr. 40).

The Secretary has established AHM was in violation of § 1910.178(a)(5). The violative conditions exposed employees to “bruising, contusions, and possible fractures” (Tr. 41). The violation is serious.

Item 5: Alleged Violation of § 1910.212(a)(3)(ii)

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

The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

Exhibit C-3 is a copy of ANSI standard B11.3-1982, “Power Press Brakes—Safety Requirements for Construction, Care, and Use.” Exhibit C-2 is OSHA directive CPL 02-01-025, “Guidelines for Point of Operation Guarding of Power Press Brakes.” Both documents emphasize the importance of guarding the point of operation on power press points.

VonLehmden observed AHM’s HTC press brake. It is used to bend 11-gauge steel approximately 6 inches wide and 50 inches long. The bed of the press brake is approximately 12 feet long. The point of operation is between the top die and the bottom die. The operator uses a foot pedal to operate the press brake. The point of operation was unguarded (Tr. 44-45).

The operator of the press brake holds the steel in place with his hands. The operator’s hands are located approximately 3 inches from the point of operation. AHM had tools at the facility to hold the steel in place while operating the press brake, but operators generally do not use them. Parker and other employees used the press brake once or twice a month (Tr. 47-49, 55, 154).

VonLehmden testified AHM could abate the condition by using a guard, or restraints, or light curtains (Tr. 53).

In AHM's defense, Miller testified AHM had no reported injuries for employees using the press brake since it was acquired in 1992. Miller stated, "[C]ommon sense has to come into play. You have to use your intelligence to know that you don't stick your fingers or your hands into moving equipment" (Tr. 173).

AHM is required to comply with OSHA's standards. Section 1910.212(a)(3)(ii) not intended to prevent injuries to people who deliberately stick their appendages into moving equipment; rather, the standard is intended to prevent accidental injury to employees who may inadvertently come into contact with the point of operation. Use of the press brake at times requires the operator to place his hands within 3 inches of the point of operation. This brings the employee within the zone of danger and requires guarding.

The Secretary has established a violation of § 1910.212(a)(3)(ii). The hazard exposes employees to crushing injuries or amputation of the fingers. The violation is serious.

Item 6: Alleged Violation of § 1910.243(c)(3)

Section 1910.243(c)(3) provides:

Vertical portable grinders. Safety guards used on machines known as right angle head or vertical portable grinders shall have a maximum exposure angle of 180°, and the guard shall be so located so as to be between the operator and the wheel during use. Adjustment of guard shall be such that pieces of an accidentally broken wheel will be deflected away from the operator. (See Figure P-4.)

VonLehmden observed two angle grinders sitting on work benches near a large sheet of metal. The grinders were not guarded. AHM had guards for the grinders available for use in a box on a shelf. The operating manual for the grinders states, "Do not remove the guard. The guard must be in place at all times that the tool is being used" (Tr. 54). Parker told VonLehmden the guards were in place when the grinders were handed out to the employees. The employees had taken the guards off the grinders before using them. Parker had observed the employees working with the unguarded grinders (Exhs. C-16-18; Tr. 58-59).

Parker stated, "It's up to the individual whether they want to use it like that or not" (Tr. 136). When Parker was asked if it was his responsibility as foreman to instruct his employees to replace

the guards, he responded, “They’re used at their own discretion” (Tr. 159). Miller acknowledged AHM has a continuing problem with employees removing the guards from the grinders (Tr. 175).

The Secretary has established AHM was in violation of § 1910.243(c)(3). The hazard created by using the grinder without the guard attached is the operator may be struck by flying debris or may come into contact with the spinning abrasive wheel. The violation is serious.

Item 7: Alleged Violation of § 1910.254(d)(9)(iii)

Section 1910.254(d)(9)(iii) provides:

Cables with damaged insulation or exposed bare conductors shall be replaced. Joining lengths of work and electrode cables shall be done by the use of connecting means specifically intended for the purpose. The connecting means shall have insulation adequate for the service conditions.

VonLehmden observed the cord of a Miller CP300E wire fed arc welder. AHM used the welder as back-up whenever one of its main welders was not functioning (Tr. 138). The cord had been damaged. AHM repaired it with wire nuts partially covered by black tape (Exh. C-21; Tr. 63). The welder was energized (Tr. 62).

Parker told VonLehmden he knew the cord was damaged and that employees had used the welder “recently” (Tr. 64). Parker testified the cable had been cut in half and “temporarily spliced up, wire nutted and taped” (Tr. 138). At the time Parker was not aware such repairs were a violation of § 1910.254(d)(9)(iii) (Tr. 138). Miller conceded AHM should not have used a cord repaired in this manner, stating, “[I]t’s just not the right thing to do” (Tr. 176).

The Secretary has established a violation of the cited standard. The violative condition exposes employees to the hazard of electrical shock (Tr. 65). The violation is serious.

Item 8: Alleged Violation of § 1910.305(b)(2)(i)

Section 1910.305(b)(2)(i) provides:

All pull boxes, junction boxes, and fittings shall be provided with covers identified for the purpose. If metal covers are used, they shall be grounded. In completed installations, each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

Behind the press brake, VonLehmden observed an electrical box without its cover. The box was located on the wall, 5 or 6 feet above the floor. The cover for the box was leaning against the

press brake, which was approximately 3 feet from the wall. The panel box was 480 volts and was energized. At the time of the inspection, Parker told VonLehmden the cover had been removed to add more power to the box, and that the cover had been off for a couple of weeks (Exh. C-22; Tr. 66-68).

AHM changed its story in the joint prehearing statement: “The press brake was being repaired prior to the inspector’s arrival and the cover had been removed for that purpose only. The cover was replaced after they were done repairing the press brake” (Joint prehearing statement, p. 5).

At the hearing, Parker gave a third rationale for the missing cover. He stated that the cover had been removed the day before by an electrician working for Titeman Pipefitters, a company that rented space in back of AHM’s facility. Parker stated, “[T]he box is hot, but the breaker was off” (Tr. 140).

The undersigned finds VonLehmden’s account to be the most credible of the three. VonLehmden was a careful witness who appeared precise in his recollection of the events of the inspection. The information Parker gave VonLehmden at the time of the inspection is the most reliable.

The Secretary has established a violation of § 1910.305(b)(2)(i). The hazard created by the missing cover was exposing employees to the risk of a severe electrical shock. The violation is serious.

Item 9: Alleged Serious Violation of § 1910.305(g)(1)(i)

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

Flexible cords and cables shall be approved for conditions of use and location.

Section 1910.305(g)(1)(ii) lists approved conditions of use and location. Flexible cords are intended to be plugged in and unplugged from electrical outlets with relative ease.

VonLehmden observed a flexible cord attached to an outlet box. AHM “hardwired” the cord into the electrical outlet by removing the prong end of the cord, stripping the wires, and connecting the stripped wires directly inside the outlet box. The flexible cord was connected to a shop light and was energized (Exh. C-23; Tr. 71).

Parker told VonLehmden “the light was used for a specific piece of machinery located relatively close to that. And, in order so it was not removed continuously and he had to then search for it, it was hardwired so it was stationary” (Tr. 71-72). The cord had been hardwired like that “for quite some time” (Tr. 72).

At the hearing, Parker gave a different version (Tr. 142-143):

That was a cord that was wired into the 110 electrical outlet. It hadn't been used for a while which was --and the assumption was made that there was power into it; and, I mean, I assumed there was power still running into it myself. We hadn't used it for some time for the droplight.

But, a couple of days later, I did take that off, and there was a wire nut on the inside. So, prior to that, a prior foreman, evidently, or somebody had already disconnected it inside the box and never pulled the line out.

The undersigned finds VonLehmden's recitation of Parker's admission during the inspection to be more credible than Parker's addendum at the hearing. VonLehmden verified during the inspection the cord was energized (Tr. 72). Parker told VonLehmden at the time that he and other AHM employees had used the shop light recently while working on the “Iron Worker” (Tr. 73). The rationale for leaving the cord attached but disconnected through use of a wire nut is cloudy at best.

The Secretary has established AHM committed a violation of § 1910.305(g)(1)(i). The hazard created by this violation is exposing employees to electrical shock (Tr. 76). The violation is serious.

Citation No. 2

Item 1: Alleged Repeat Violation of § 1910.212(a)(3)(ii)

The Secretary alleges AHM committed a repeat violation of § 1910.212(a)(3)(ii).¹ VonLehmden observed a Geka Iron Worker Hydracrop punch press, used to punch holes in steel. The point of operation of the punch press was unguarded. The operator holds the steel in place with his hands, within a couple of inches of the point of operation (Exh. C-25; Tr. 75-76, 82). Parker told VonLehmden he and other employees had operated the punch press earlier that week (Tr. 77-78, 81). Parker stated the punch press had a guard that had fallen off a couple of months before the inspection, and he had not gotten around to replacing it (Tr. 81).

AHM argues the punch press is difficult to use with the guard in place when the operator is performing channel work (using a U-shaped piece of metal). AHM did not assert the affirmative defense of infeasibility. VonLehmden testified AHM could use restraints in lieu of a guard on the punch press while doing channel work (Tr. 188). Miller, who did not know about the existence of restraint systems, did not dispute VonLehmden's testimony (Tr. 183).

The Secretary has established a violation of § 1910.212(a)(3)(ii). A violation is considered a repeat violation "if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979).

On December 1, 2005, the Secretary issued AHM a citation for the serious violation of § 1910.212(a)(3)(ii). The citation states (Exh. C-29):

On or about June 28, 2005, the point of operation at the punching station on Geka Iron Worker Model Hydracorp 50A, located in the middle of the fabrication shop, was not properly guarded in accordance with ANSI B11.5-1975.

¹ This is the same standard cited in item 5 of Citation No. 1:

The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

The citation arose from an inspection conducted on June 28, 2005. Exhibit C-37 shows the same punch press at issue here during the previous inspection. The point of operation (below the striker plate) was unguarded (Tr. 87). The parties entered into an Informal Settlement Agreement on December 28, 2005, which became a final order (Exh. C-30).

“A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard.” *Superior Electric Company*, 17 BNA OSHC at 1638. Both violations were on the same machine and were of the same standard and created the same hazard: exposure of the operator’s fingers and hands to crushing injuries. The Secretary has established the violation was properly classified as repeat.

Penalty Determination

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.

AHM employed nine employees and is a small employer (Tr. 20). The Secretary had cited AHM for safety violations in 2005 (Exh. C-29).

AHM deserves no credit for good faith. Its safety program is inadequate. Shop foreman Parker was unaware that several of the hazardous conditions present at his facility were violations of OSHA standards. Both Parker and Miller were aware employees were removing guards from the grinders and using the stationary machines unguarded, yet they did not discipline the employees or require them to use guards.

Miller explained he contested the two instant citations primarily because of the proposed penalties (Tr. 180): “Right now, Automated Handling is in a very big struggle mode. I guess it’s one of the reasons I’m not contesting some of the issues, but, I’m contesting some of the costs. We’re just trying to stay in business.”

Miller argues AHM has not recorded a lost work time incident since it opened in 1992 (Tr. 180). He claims the complaint that gave rise to OSHA’s inspection resulted from disgruntled former employees (Tr. 180-181): “This particular incident came up because I fired people for using

drugs and drinking, and in order to get their unemployment, they turned me in for unsafe working conditions.”

While the undersigned is sympathetic to AHM’s financial situation, she is also aware of the ongoing safety infractions at AHM’s facility. Whatever the motive for the complaint, OSHA did find legitimate safety concerns during the inspection. The previous OSHA inspection (in 2005) did not inspire AHM to create an adequate safety program or to discipline employees who disregarded machine guarding standards in full view of management personnel.

Items 2, 3, 7, 8, and 9 of Citation No. 1 are of moderate gravity. The employees were not exposed to the violative conditions on a daily basis. The trucks at issue in items 2 and 3 were used approximately once a week. The electrical hazards at issue in items 7, 8, and 9 each resulted from single devices (an arc welder, an electric box, and a shop light, respectively) used in a limited area. Items 3, 7, 8, and 9 were corrected during the inspection. It is determined the appropriate penalty for each of these items is \$300.00.

The gravity of the machine guarding violations found in items 5 and 6 are higher. Each time an employee was required to use the HTC press brake, he placed his fingers in the zone of danger. Employees using the unguarded portable grinders were continuously exposed to contact with the abrasive wheels or to being struck by flying debris. It is determined the appropriate penalty for item 5 is \$1,000.00, and for item 6 is \$600.00.

The gravity of item 1 of Citation No. 2 is high. Employees using the punching station were exposed to crushing injuries every time they used the machine. OSHA had cited AHM for not guarding the same machine two years prior to inspection at issue. The appropriate penalty is \$4,000.00.

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 the cited standards be disposed of as follows:

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1910.178(a)(4)	Vacated	\$ 0.00
2	§ 1910.178(a)(5)	Affirmed	\$ 300.00
3	§ 1910.178(p)(1)	Affirmed	\$ 300.00
4	§ 1920.212(a)(1)	Vacated	\$ 0.00
5	§ 1910.212(a)(3)(ii)	Affirmed	\$1,000.00
6	§ 1910.243(c)(3)	Affirmed	\$ 600.00
7	§ 1910.254(d)(9)(iii)	Affirmed	\$ 300.00
8	§ 1910.305(b)(2)	Affirmed	\$ 300.00
9	§ 1910.305(g)(1)(i)	Affirmed	\$ 300.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1910.212(a)(3)(ii)	Affirmed	\$4,000.00
TOTAL			\$7,100.00

/s/ _____
NANCY J. SPIES
Judge

Date: August 29, 2008