

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.
Choice Fabricators, Inc.,
Respondent.

OSHRC Docket No. **08-0944**

Appearances:

Joseph Luckett, Esquire, Nashville, Tennessee
For Complainant

Mark Beverwyk, Director of Operations, Suwanee, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Choice Fabricators Inc. (CFI) manufactures metal parts for various customers at a plant in Rainbow City, Alabama. On February 21, 2008, Occupational Safety and Health Administration (OSHA) compliance officer James Cooley inspected CFI's plant because its employees' accident/injury rate was high for the industry. After the inspection, CFI received citations on June 6, 2008 for violations of the OSHA standards involving lockout/tagout (LOTO) and mechanical power presses. CFI timely contested the citations.

The serious citation alleges CFI violated 29 C.F.R § 1910.147(c)(4)(i) (item 1a) for failing to develop and utilize LOTO procedures for employees changing dies on mechanical presses in the manual department; 29 C.F.R § 1910.147(d)(3) (item 1b) for failing to protect employees changing dies on the presses by the proper use of safety blocks; 29 C.F.R § 1910.147(c)(6)(i) (item 2) for failing to conduct periodic inspections of its LOTO procedures; 29 C.F.R § 1910.147(c)(7)(i)(A) (item 3) for failing to train employees changing dies on LOTO procedures; 29 C.F.R § 1910.217(c)(2)(i)(d) (item 4) for failing to secure guards on the back side of the presses; 29 C.F.R § 1910.217(c)(3)(vii)(a) (item 5) for permitting two employees to use a single two-hand control to operate a press; 29 C.F.R § 1910.217(c)(3)(vii)(d) (item 6) for failing to fix in position two-hand

controls used to operate the presses; and 29 C.F.R § 1910.217(h)(6)(iii) (item 7) for permitting an employee to use a job-made key to bypass the presence sensing device initiation (PSDI). The serious citation proposes a penalty of \$3,500.00 for each alleged violation for a total penalty of \$24,500.00.

The other-than-serious citation alleges CFI violated 29 C.F.R § 1904.29(b)(1) (item 1) for failing to include a detailed description of injuries and /or illnesses on the OSHA 300 Logs for the years 2005, 2006 and 2007; and 29 C.F.R § 1904.32(b)(4) (item 2) for failing to certify the OSHA 300 Logs by the highest company executive. The other-than-serious citation proposes a penalty of \$2,100.00 for item 1 and no penalty for item 2.

The hearing was held in Gadsden, Alabama on December 9 and 10, 2008. The parties stipulated to jurisdiction and coverage (Tr. 4). For settlement purposes, the parties agreed to the withdrawal of CFI's contest to serious citation, item 4, with a reduction in penalty to \$3,000.00; other-than-serious citation, item 1, with a reduction in penalty to \$1,000.00; and other-than-serious citation, item 2, with no penalty (Tr. 5). The terms of the partial settlement are approved and incorporated into this Decision and Order. The parties filed post-hearing briefs.

CFI denies the alleged violations and contends the LOTO standards do not apply to die changing procedures. If LOTO is applicable, CFI claims its die-setters are not exposed to a hazard. With regard to the alleged violations of the mechanical power press standards, CFI claims its press operators are not exposed to a hazard.

For the reasons discussed, CFI's arguments are rejected and the violations are affirmed as serious and a total penalty of \$14,000.00 is assessed except for the alleged violation of §1910.217(h)(6)(iii) (item 7) which is vacated.

The Inspection

CFI fabricates metal parts for various customers at a plant in Rainbow City, Alabama. At the time of the OSHA inspection, CFI employed approximately 250 employees and operated two shifts (Tr. 114, 282).

The plant's manual department has 23 mechanical power presses used to fabricate metal parts. The mechanical presses, manufactured by Minsters, Niagra, Danly, and Clearing & Verson, are part revolution presses which allow the operator to disengage the clutch at any point before the

crank shaft has completed a full revolution and the press slide a full stroke (Tr. 20-21, 164, 224). See § 1910.211(d)(6).

On February 21, 2008, OSHA compliance officer Cooley inspected CFI's plant because, according to OSHA records, the employees' accident/injury rate was high for the industry. Cooley's inspection focused on the mechanical power presses in CFI's manual department. CFI provided Cooley with copies of its LOTO program and its die changing program (Exhs. C-1, C-4; Tr. 14, 16).

During his walk around inspection, Cooley observed four employees changing dies on the power presses without utilizing LOTO procedures. According to CFI, employees changing dies follow specific procedures for die changing and are exempt from its LOTO program. Cooley videotaped CFI's die changing operation (Exh. C-15; Tr. 51).

While the presses were in normal operation, Cooley observed the press operators freely moving the two-hand controls around in front of the presses. He also saw two operators using a single two-hand control to operate the Danly #39 press. In another incident, Cooley saw an operator after interrupting the light curtain, insert a job-made key into a slot on the press which he understood bypassed the PSDI switch. Maintenance manager Terry Tatum testified the key was for the selector switch which allows the ram to reposition itself for a single run (Exh. C-11, C-12, C-14; Tr. 70, 80, 88).

Based upon Cooley's inspection, CFI received the citation alleging the violations at issue.

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).

There is no dispute that the presses in CFI's manual department are mechanical power presses within §1910.217 and that OSHA's LOTO standards at §1910.147 apply when performing "servicing and maintenance" on the presses. Also, CFI does not dispute its knowledge of the cited

conditions or that it did not comply with the terms of the cited LOTO and mechanical power press standards.¹

The issues in dispute are whether die changing is “servicing and maintenance” within the application of LOTO and whether the employees were exposed to hazards during die changing or the normal operation of mechanical power presses.

Application of LOTO to
DIE CHANGING

Section 1910.147 requires locking and tagging out of machinery and equipment to control hazardous energy sources during “servicing and maintenance” where the employees could be exposed to injury by the unexpected energization, startup, or the release of stored energy. To control the energy sources, the employer must develop an energy control program to ensure the machine and equipment are isolated from the energy source and rendered inoperative before servicing and maintenance is performed. The application of the LOTO standards is addressed in § 1910.147(a)(2) which provides:

(i) This standard applies to the control of energy during servicing and/or maintenance of machines and equipment.

_____ (ii) Normal production operations are not covered by this standard (See subpart O of this part). Servicing and/or maintenance which takes place during normal production operations is covered by this standard only if:

_____ (A) An employee is required to remove or bypass a guard or other safety device; or

(B) An employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or where an associated danger zone exists during a machine operating cycle.

NOTE: Exception to paragraph (a)(2)(ii):

Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection (See subpart O of this part).

¹Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

CFI's written LOTO program applies to the presses in the manual department and is required to be followed when performing "servicing and maintenance" work on the presses. The program identifies the presses as having the potential for unexpected energizing, start-up or release of stored energy and having more than one energy source. It describes the sources of energy as electrical, hydraulic and pneumatic. The procedure establishes eight steps in applying LOTO to the presses.

The Secretary does not dispute that CFI's written LOTO program complies with § 1910.147. The minor tool change exception to developing LOTO procedures at §1910.147(c)(4)(i) does not apply and has not been asserted by CFI.²

The dispute arises because CFI does not consider changing dies on the presses as "servicing and maintenance" work and does not require its die-setters to apply LOTO procedures (Tr. 140). The die-setters are specifically exempted from its LOTO procedures (Exh. C-1, p. 2). CFI considers changing dies as part of normal production work. Cooley observed four employees changing dies during his inspection. CFI identified 37 die-setters (Tr. 31).

CFI's die-setters are required to follow other written procedures entitled *Manual Department Die Set-Up Instruction and Check Sheet* when changing the dies (Exh. C-4). CFI's die changing procedures do not comply with §1910.147 because the sources of potential energy are not locked out.

_____ CFI's argument that the LOTO requirements do not apply to die changing procedures is rejected. The Secretary defines "servicing and/or maintenance" as:

Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy. *See*, § 1910.147(b).

The Secretary defines "setting up" as:

Any work performed to prepare a machine or equipment to perform its normal production operation. *See*, §1910.147(b).

²Exceptions are to be narrowly construed and the party seeking the benefit of an exception has the burden to show its compliance. *Kasper Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

“Normal production operation” is defined as:

The utilization of a machine or equipment to perform its intended production function. *See*, §1910.147(b).

The Secretary’s definitions and the LOTO standards make it clear that “servicing and maintenance” includes die changing within the setting up activities on the presses.³ The Secretary’s intent to apply LOTO to die changing is reflected in her Standard Interpretations. The December 28, 2006, Standard Interpretation clearly states “Die-setting activities constitute servicing activities and are covered by the LOTO standard, *i.e.*, pursuant to the definitions of “Setting up” and “Servicing and/or maintenance” contained in §1910.147(b)” (Exh. C-3). Also, an April 22, 2005, Standard Interpretation states “*Setting up* activities, by definition, involve work that prepares a press to perform its intended normal production operation; therefore, this exception [minor tool changes] generally would not apply to hydraulic and mechanical power press die-setting because the servicing activity is not taking place during NPOs [normal production operation]” (Exh. C-2, fn. 1). Also, see *Westvaco Corp.*, 16 BNA OSHC 1374 (No. 90-1341, 1993) (Helper had to adjust the machine prior to running each order; the adjustments constituted “setting up” activities that did not take place “during normal production operations.”).

In this case, the record does not support a claim that changing dies is part of “normal production.” Supervisor of the press shop, Dale Rigsby, testified the presses run to produce a part. When CFI finishes producing the part, the presses stop and the die is changed and a new part produced. The dies may not be changed for a couple of days or they may be changed as often as six times in an eight-hour shift. It takes approximately 30 minutes to change a die (Tr. 281, 283). This is not normal production, as all production stops while the die is changed. Die changing is servicing of the presses.

CFI has 21 different presses and no evidence was presented as to how its method of changing dies protects employees from the potential of unexpected energizing, start-up or release of stored energy. The sources are not locked out. Also, CFI offered no explanation as why it uses LOTO on

³The wording of a standard must be interpreted in a reasonable manner consistent with a common sense understanding. *Globe Industries, Inc.*, 10 BNA OSHC 1596, 1598 (No. 77-4313, 1982). The words are to be viewed in context, not in isolation, and judged in light of its application to the facts of the case. *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991).

the presses when engaged in “servicing or maintenance” and not its alternative die changing procedures which it alleges are as safe.

The Secretary notes, in Standard Interpretation dated April 22, 2005, that

in some cases, the implementation of effective machine guarding techniques may eliminate worker exposure to hazardous energy, providing a feasible and acceptable alternative to LOTO. However, when machine guarding methods do not eliminate exposure to hazardous energy, LOTO is required to prevent die-setter employees from being seriously injured when performing die-set servicing activities (Exh. C-2, p.2).

Effective machine guarding techniques were not shown in this case. To change the dies, the employees bypassed the light curtains and worked at the press’ point of operation. Also, the LOTO standard is intended to work in conjunction with the machine guarding standards to provide optimum employee protection.

The LOTO standards apply to CFI’s die changing activities.

CITATION No. 1

Item 1a - Alleged Violation of § 1910.147(c)(4)(i)

The citation alleges LOTO procedures were not developed and utilized for employees changing dies. Section 1910.147(c)(4)(i) provides:

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

CFI’s LOTO program identifies the energy sources on the presses as electrical, pneumatic, and mechanical. The written LOTO procedures for the presses require the employee to:

1. Notify affected employees that a lockout/tagout is going to be implemented.
2. If working on clutch/brake bring ram to the bottom of the stroke.
3. If the machine is operating shut it down through the normal stopping procedure.
4. Pull electrical disconnect and lock it out.
5. Test for electrical current.
6. Shut off air supply and lock it out.
7. Stored energy (flywheel, air) must be dissipated by waiting for the flywheel to stop and bleeding down stored air.
8. Block up ram. (Exh. C-1).

However, CFI's LOTO program provides that "the only exception to this rule is employees involved in the Die Set-up Procedure. They are trained on that procedure" (Exh. C-1, p.2). In contrast to the LOTO procedures, CFI's die removal and set-up procedures provide:

Die Removal Instructions:

1. Shut the power off before performing any action to the press.
2. Make sure the Press and the work area is clean.
3. If any Material is left from the previous run, make sure it is moved and placed in the proper storage location.
4. Close Die, **E-Stop!!**
5. Undo all bolts "Top & Bottom" # of bolts may vary!
6. Remove & Secure undone bolts and tools.
7. E-Stop! "Raise Press" E-Stop! "Add slide prevention bolt, if necessary" (If space is between die and press no prevention bolt needed!).
8. Notify Forklift driver "Remove die."

Die Setting Instructions:

1. Clean! Press & Work area "Remove slide prevention bolt!
2. Die returns "Make sure Forklift driver aligns properly."
3. **E-Stop!** "Lower press onto die until you can see no light" E-Stop!
4. Tighten all bolts! (Top & Bottom) #of bolts may vary!
5. Check all bolts!!
6. Set press! Inch down and set by crash block!
7. Remove & Secure unused bolts and tools!
8. E-Stop! Run 1st piece, get it checked for quality! (Take 1st piece, blank, and sample to (Exh. C-4).

Such die changing procedures are required by §1910.217(d)(9). However, CFI's written die changing procedures do not comply with the requirements of a written LOTO program required by §1910.147(c)(4)(i). The procedures fail to prevent the unexpected energization, start up, or the release of stored energy on the presses. Also, the die changing procedures require the employee to remove or bypass a guard or other safety device, *i.e.*, a light curtain, and to place a part of his body (hands) into or near the point of operation, or where an associated danger zone exists during a press' operating cycle. *See*, § 1910.147(a)(2)(ii). The die-setters work inside the light curtain and at the point of operation of the press while changing the dies (Tr. 263). Pursuant to §1910.217(h)(1)(iv), "The PSDI mode of operation shall be used only for normal production operations. Die-setting and maintenance procedures . . . shall not be done in the PSDI mode." The need for utilizing LOTO

is increased in this case because as many as two employees could be involved in changing the dies on a press (Tr. 280).

CFI's argument that there is no danger because when changing dies, metal is resting on metal is rejected. When changing the dies, the ram starts in the upper position and the employee is in the zone of danger. Also, the use of safety blocks to prevent the upper ram from coming down on the employee is rejected because the blocks were laying down horizontally and would not block a falling ram (Exhs. C-5, C-6; Tr. 35-36).

CFI's reliance upon ANSI/ASSE Z244.1-2003, *Control of Hazardous Energy Lockout/Tagout and Alternative Methods*, is misplaced (Exh. R-1; Tr. 138). The ANSI standard has not been adopted as, or incorporated by reference into, the OSHA's LOTO standards at §1910.147. CFI's compliance with ANSI standard is not compliance with the OSHA standard. *See*, OSHA Standard Interpretation, November 10, 2004 (Exh. C-16).

A serious violation of § 1910.147(c)(4)(i) is established.⁴ CFI knew its LOTO procedures exempted die changing activities and the die-setters could receive serious injury from the unexpected energization of the press while changing dies at the point of the operation.

Item 1b - Alleged Violation of § 1910.147(d)(3)

The citation alleges employees while changing dies on presses were not protected by the proper use of safety blocks. Section 1910.147(d)(3) provides:

All energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy sources(s).

A safety block is "a prop that when inserted between the upper and lower dies or between the bolster plate and the face of the slide, prevents the slide from falling of its own deadweight." § 1910.211(d)(48). A safety block is an "*energy isolating device*" which is defined in part at §1910.147(b) as

⁴A violation is serious under § 17(k) of the Occupation Safety and Health Act (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).

a mechanical device that physically prevents the transmission or release of energy, including but not limited to the following: a block; and any similar device used to block or isolate energy.”

During his inspection, Cooley observed the safety or die blocks not being utilized properly by employees while changing dies. The blocks were laid in a horizontal position, affording no safety to employees. Also, several blocks were shorter than the dies. According to Cooley, maintenance manager Tatum said there were not enough blocks of the proper size for all the dies (Tr. 56-57). This evidence was not disputed by CFI.

A serious violation of § 1910.147(d)(3) is established. CFI knew of the improper use of safety blocks and employees could have been seriously injured by amputation or caught by hazard.

Item 2 - Alleged Violation of § 1910.147(c)(6)(i)

The citation alleges CFI did not inspect its LOTO procedures. Section 1910.147(c)(6)(i) provides:

The employer shall conduct a periodic inspection of the energy control procedure at least annually to ensure that the procedure and the requirements of this standard are being followed.

At least annually, an authorized employee, other than the employees utilizing the energy control procedures, must inspect and verify the effectiveness of its LOTO procedures. The inspections are intended to ensure the energy control procedures are properly being implemented and to provide a check on their continued utilization. Written documentation which is certified and containing the designated information must be maintained. *Louisiana-Pacific Co.*, 17 BNA OSHC 1395, 1399 (No. 93-0872, 1995).

CFI’s written LOTO program provides for annual inspections (Exh. C-1, p.4: Tr. 63-64). However, when Cooley requested copies of the inspections, no written documentation was provided. Tatum claimed he reviewed the LOTO procedures, but he did not perform any audits or inspections (Tr. 59, 214-215). He did not use authorized employees or affected employees in the review (Tr. 65).⁵

⁵“*Affected employee*” is “an employee whose job requires him/her to operate or use a machine or equipment on which servicing and maintenance is being performed under lockout or tagout or whose job requires him/her to work in an area in which such servicing or maintenance is being performed.”

“*Authorized employee*” is “a person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment.” §1910.147(b).

At the hearing, CFI introduced the monthly press inspection reports which it claims is also its LOTO inspection reports (Exh. R-7). A review of CFI's press inspection report shows that it fails to comply with the LOTO standard. The form, which was not filled out, does not contain the required information including the certification, the identity of the press on which the energy control procedure was being utilized, the date of the inspection, the employees included in the inspection, and the person performing the inspection.

A serious violation of § 1910.147(c)(6)(i) is established. CFI knew of the lack of periodic inspections and employees were exposed to possible serious injury.

Item 3 - Alleged Violation of § 1910.147(c)(7)(i)(A)

The citation alleges employees changing dies had not received training on LOTO procedures. Section 1910.147(c)(7)(i)(A) provides:

Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.

There is no dispute that CFI's die-setters were not trained in LOTO procedures. CFI did not require the use of LOTO when changing dies. CFI's argument that die-setters are not "authorized employees" is rejected. "An affected employee becomes an authorized employee when that employee's duties include performing servicing and maintenance" covered by the LOTO standards. See §1910.147(b). When changing dies, the die-setters are considered authorized employees. As identified by CFI, 37 employees were involved in changing dies (Tr. 67). These employees had not received LOTO training.

A serious violation of § 1910.147(c)(7)(i)(A) is established. CFI knew the die-setters were not trained in its LOTO procedures and that they were exposed to possible serious injury. The dies are changed frequently.

Item 5 - Alleged Violation of § 1910.217(c)(3)(vii)(a)

The citation alleges two employees in the press area operating the Danly #39 press were using a single two-hand control to operate the press. Section 1910.217(c)(3)(vii)(a) provides:

When used in press operations requiring more than one operator, separate two hand controls shall be provided for each operator, and shall be designed to require concurrent application of all operators;

controls to activate the slide. The removal of a hand from any control button shall cause the slide to stop.

During his inspection, Cooley observed two employees using a single two-hand control to operate a press (Exh. C-11). While the employees operated the press with a single control, he saw their free hands move the metal parts in and out of the die. Cooley described it as “hand-in-die operation” (Tr. 73).

The standard requires separate two-hand controls to be used by each employee so that during press operation, both buttons on each control are pushed concurrently to activate the ram and preventing an employee’s hand from being exposed to the point of operation. Safety consultant Beverwyk said the employees had been working at the station with a single control for one week. Maintenance manager Tatum said he walks around the department throughout the day (Tr. 76).

The presses have PSDIs or light curtains⁶ which should stop the slide when tripped. However, the use of a PSDI or light curtain does not relieve CFI of the prohibition against separate two-hand controls. The standard requires that presses operated in the PSDI mode “shall be equipped with a brake monitor that meets the requirements” of the section. §1910.217(h)(5)(i). Tatum testified that not all the presses at the facility have a brake monitoring system. He could not recall how many presses had such a system (Tr. 265). Also, Cooley testified the employees could place their hands beneath the PSDI, as there was a portion that was not covered by the device (Tr. 75).

Also, CFI’s compliance with the PSDI standard does not mean an employer does not need to comply with the two-hand control standard. The conditions (a two-hand control and a PSDI) are not duplicative requirements where the standards are “directed at fundamentally different conduct.” *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2207 (No. 87-2059, 1993). The standards cited in this case address different conduct, and the abatement of one does not abate the other. In addition, CFI must comply with “all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards *may* be satisfied by compliance with the more

⁶A “presence sensing device initiation” (PSDI) is defined at § 1910.211(d)(61) as:
an operating mode of indirect manual initiation of a single stroke by a presence sensing device when it senses that work motions of the operator, related to feeding and/or removing parts, are completed and all parts of the operator’s body or hand tools are safely clear of the point of operation.

comprehensive standard.” *H.H. Hall Construction, Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981). The fact CFI’s presses have light curtains to protect the point of operation does not relieve CFI of complying with the proper utilization of two-hand controls.

A serious violation of § 1910.217(c)(3)(vii)(a) is established. If an employee reached into the die, he would suffer amputation or injury (Tr. 76). CFI had knowledge of the operation of the single two-hand control by two employees.

Item 6 - Alleged Violation of § 1910.217(c)(3)(vii)(d)

The citation alleges the press operators were able to freely move the two-hand controls when operating the presses. Section 1910.217(c)(3)(vii)(d) provides:

Two hand controls shall be fixed in position so that only a supervisor or safety engineer is capable of relocating the controls. All energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy sources(s).

The operators were observed freely moving the pedestal mounted two-hand controls while operating the presses. The operators placed the controls very close to the point of operation and were seen removing the metal parts without having to stretch out from the controls. When asked why the controls were movable, Tatum stated that it was for the ease of use so that employees do not damage the controls. CFI does not dispute that the controls were freely movable (Tr. 80, 84).

To keep operators a safe distance from the point of operation, §1910.217 provides for a minimum safe distance (Tr. 81, 82). By having stationary two-hand controls, the safe distance of the operator from the point of operation is maintained. As noted by the Commission, “moving the controls to close to the press’ point of operation would clearly expose the machine’s operator to the hazard posed by the point of operation.” *Mayflower Vehicle Systems, Inc.*, 19 BNA OSHC 1538, 1539 (No. 99-1319, 2001),

A serious violation of § 1910.217(c)(3)(vii)(d) is established. CFI knew the two-hand controls for the presses were not stationary and that employees were subject to serious injury from exposure to the presses’ points of operation.

Item 7 - Alleged Violation of § 1910.217(h)(6)(iii)

The citation alleges an employee used a job-made key to bypass the presence sensing device initiation (PSDI). Section 1910.217(h)(6)(iii) provides:

The mode selection means of paragraph (b)(7)(iii) of this section shall have at least one position for selection of the PSDI mode. Where more than one interruption of the light sensing field is used in the initiation of a stroke, either the mode selection means must have one position for each function, or a separate selection means shall be provided which becomes operable when the PSDI mode is selected. Selection of PSDI mode and the number of interruptions/ withdrawals of the light sensing field required to initiate a press cycle shall be by means capable of supervision by the employer.

During the OSHA inspection, Cooley testified he saw an employee trigger the light curtain and then use a job-made key to bypass the PSDI switch (Exh. C-14). The employee had interrupted the light curtain while cleaning waste materials from the press using a flat piece of metal. Cooley testified he then saw the employee reset the light curtain with a job-made key and continue his work. A supervisor was not needed to reset the light curtain (Tr. 87-89, 217-218). According to Cooley, maintenance manager Tatum told him that key operated the switch to the PSDI and had been used for at least one week (Tr. 90, 204). According to Cooley, without having a supervisor to reset the light curtain, CFI could not monitor the ram's proper braking capability and the system could be overridden (Tr. 171).

Tatum contradicted Cooley's testimony and testified that the light curtains was not operated by a key (Tr. 259). He stated that after the light curtain was tripped, it remained on and that the controls needed to be reset by the employee to allow the press to operate. When the press' cycle is interrupted because the light curtain is tripped, the press has to be turned to the "inch mode" and inched back to the top to start the cycle over. According to Tatum, the resetting operation does not require a supervisor (Tr. 268-269). Tatum's testimony is given weight based upon his familiarity with CFI's presses as maintenance manager.

The violation of § 1910.217(h)(6)(iii) is not established. The job-made key was not for the purpose of activating the PSDI. Also, the Secretary failed to show that the selection of PSDI mode and the number of interruptions/withdrawals was not "capable of supervision" by CFI. Although no supervisor was involved in the employee's use of the key, the Secretary failed to show that CFI was not aware of the selection of the PSDI mode. The employee was Hispanic and could not speak or understand English (Tr. 90). The employee had been operating with the key for a week (Tr. 90).

Penalty Consideration

In determining an appropriate penalty, consideration of the size of the employer's business, history of the employer's previous violations, the employer's good faith, and the gravity of the violation is required. Gravity is the principal factor.

CFI has approximately 250 employees and is not entitled to credit for size. CFI is entitled to credit for history and good faith. CFI has not received a serious citation within three years (Tr. 114). CFI has safety program including a written LOTO program and die changing program. Also, there is no evidence of prior injuries or accidents to employees.

A penalty of \$2,000.00 is reasonable for grouped violations of § 1910.147(c)(4)(i) and § 1910.147(d)(3) (items 1a and 1b). CFI's LOTO program failed to apply to its die changing procedures. CFI identified 37 die-setters.

A penalty of \$2,000.00 is reasonable for violation of § 1910.147(c)(6)(i) (item 2). Although CFI has a die changing procedure, such procedure does not comply with LOTO. CFI's monthly press inspections fail to comply with the standard's periodic inspections requirements.

A penalty of \$2,000.00 is reasonable for violation of § 1910.147(c)(7)(i)(A) (item 3). CFI identified 37 die-setters who had not received training on LOTO procedures.

A penalty of \$2,000.00 is reasonable for violation of § 1910.217(c)(3)(vii)(a) (item 5). Two employees were using a single two-hand control to operate the press. Each employee's free hand was observed moving material in and out of the press' point of operation.

A penalty of \$2,000.00 is reasonable for violation of § 1910.217(c)(3)(vii)(d) (item 6). The two-hand controls for the presses were not stationary. The employees were observed moving the controls close to the point of operation.

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:

Citation 1

1. Serious violations of § 1910.147(c)(4)(i) (item 1a) and 1910.147(d)(3) (item 1b), are affirmed and grouped penalty of \$2,000.00 is assessed.

2. Serious violation of § 1910.147(c)(6)(i) (item 2), is affirmed and penalty of \$2,000.00 is assessed.

3. Serious violation of § 1910.147(c)(7)(i)(A) (item 3), is affirmed and a penalty of \$2,000.00 is assessed.

4. Serious violation of § 1910.217(c)(2)(i)(d) (item 4), is affirmed pursuant to the parties' settlement and a penalty of \$3,000.00 is assessed.

5. Serious violation of § 1910.217(c)(3)(vii)(a) (item 5), is affirmed and penalty of \$2,000.00 is assessed.

6. Serious violation of § 1910.217(c)(3)(vii)(d) (item 6), is affirmed and a penalty of \$2,000.00 is assessed.

7. Serious violation of § 1910.217(h)(6)(iii) (item 7), is vacated and no penalty is assessed.

Citation 2

1. Other than serious violation of § 1904.29(b)(1) (item 1), is affirmed pursuant to the parties' settlement and a penalty of \$1,000 is assessed.

2. Other than serious violation of § 1904.32(b)(4) (item 2), is affirmed pursuant to the parties' settlement and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: May 15, 2009