

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 93-1853

FABRICATED METAL PRODUCTS, INC.,

Respondent.

DECISION

Before: WEISBERG, Chairman; and GUTTMAN, Commissioner.

BY THE COMMISSION:

The issues before the Commission are whether Commission Administrative Law Judge Robert A. Yetman erred in vacating alleged serious violations of machine guarding standards relating to points of operation and horizontal shafting. The cited standards, at 29 C.F.R. §§ 1910.212(a)(3)(ii)¹ and 219(c)(2),² were promulgated by the Secretary of Labor's

¹That standard provides:

§ 1910.212 General requirements for all machines.

(a) *Machine guarding*— . . . (3) *Point of operation guarding*. . . (ii) 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.

²That standard provides:

§ 1910.219 Mechanical power-transmission apparatus.

. . .

(c) *Shafting*— . . . (2) *Guarding horizontal shafting*. (i) All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform, excepting runways used exclusively for oiling, or running adjustments, shall be protected by a stationary casing enclosing shafting

(continued...)

Occupational Safety and Health Administration (“OSHA”). The basic controversy is whether the Secretary proved, as required, that employees of Fabricated Metal Products, Inc. (“FMP”) were exposed to the hazards. Having thoroughly reviewed the evidence and the parties’ extensive arguments, we agree with the judge that the alleged violations should be vacated.

SUMMARY OF FACTS

The machines in question are power presses FMP uses to form small metal parts such as fuel filters and copper cones for explosive devices. The presses, located in FM’s eyelet department, are electrically powered. They range from six to 12 feet in both height and width. The citation addressed two potential hazards presented by the presses. First, each press has a series of points of operation (“plungers” or “rams”) located between 36 and 50 inches above the floor in the front, where blank metal pieces are cut, transferred, and formed into finished parts.³ Second, the presses have unguarded horizontal shafting (“camshafts”) above and below the points of operation. The upper shafts are 5 to 7 feet above the floor, and the rotation of their cams drives the plungers. The lower shafts are 2 to 3 feet above the floor, and the rotation of their cams pushes the parts out of the die after the plunger retracts. The camshafts are smooth and are lubricated frequently. Their rotation does not create a vacuum effect. The presses generate about 45 strokes a minute.

Two types of employees work near the presses -- machine operators and toolmakers. A machine operator is responsible for overseeing the operation of two or more presses and assuring that the fabricated parts have the correct specifications. The operator starts up the press and retrieves finished parts. The operator is required to call a toolmaker if a press malfunctions in any way. Toolmakers handle all repairs and are responsible for setting up and adjusting the press for each type of metal part to be fabricated. Toolmakers perform their work with the press totally shut down.

²(...continued)

completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

³Most of the cited machines have no point of operation guards. Six of the cited machines had partial guarding.

OSHA compliance officer (“CO”) Robert Kowalski testified that he observed an employee standing 12-18 inches from the unguarded points of operation on one operating press, with his legs 18-20 inches from the unguarded lower camshaft, and with a hand about 6 inches from one of the points of operation, for 30-45 seconds. The employee appeared to be adjusting a sensor probe with a small hand tool. Kowalski further testified that he noticed another employee with his hand approximately 12-14 inches from a point of operation while blowing out a press with compressed air while the press was operating. The employee’s body was 26-28 inches away from points of operation and 18-20 inches from the lower camshaft. Kowalski also testified that he observed employees walking in the aisles between presses, coming within 3 feet of points of operation.

Based on the proximity of employees to the unguarded points of operation and camshafts, the Secretary alleges that the employees were exposed to the hazard of having clothing or body parts caught in the presses if the employees slipped or fell. Kowalski testified, and the Secretary concedes, that there was no operational reason for the employees to come into contact with either the points of operation or the camshafts.

Barrels are stored behind the presses, between the employee walkway and the exposed points of operation and camshafts. Also, there were numerous obstructions to access to the camshafts and the points of operation from the front -- boxes, barrels, splash guards, and the coils of metal that were fed into the presses automatically from the front. The boxes (some cardboard, some plastic or metal) and the barrels caught the finished parts as they came out on chutes or conveyor belts. The splash guards and flying parts guards, present on many of the presses, also block employee access to part of the lower cams.

The presses are fully automated. Most of the points of operation open only a ¼-inch, although a few open as much as 3 inches. There is a cylindrical sensor probe (approximately the size of a pencil) between each of the points of operation. The sensor is designed to stop the press if product becomes misaligned during the production process. FMP’s safety coordinator, Lars Johnson, testified that a sensor would shut down the machine “in a fraction of a second” if the sensor detected anything abnormal in the transfer of parts or if excessive pressure was applied to the sensor as it was being adjusted.

DISCUSSION

The Secretary always bears the burden of proving employee exposure to the violative conditions.⁴ Here, the dispute centers on whether the Secretary proved such employee exposure.

The two seminal Commission cases that are relevant to our inquiry here are *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶ 24,979 (No. 12470, 1980), and *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶ 20,448 (No. 504, 1976). *Gilles & Cotting* addressed the general question of employee exposure to hazards. *Rockwell* addressed the specific question of employee exposure arising from the actual operation of a machine.

In *Gilles & Cotting*, the Commission set forth a test for employee exposure based on the principle of “reasonable predictability.” 3 BNA OSHC at 2003, 1975-76 CCH OSHD at p. 24,425. The Commission held that the Secretary bore the burden of proving:

that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger.

*Id.*⁵

In *Rockwell*, the Commission set forth the standard of employee exposure to hazards presented by the employee’s operation of a machine. The Commission stated:

⁴As to a specification standard such as the camshaft guarding standard at issue here (§ 1910.219(c)(2)), proof of noncompliance with the standard establishes the existence of a hazard. With a general standard such as the point of operation guarding standard in this case (§ 1910.212(a)(3)(ii)), the Secretary must prove that the violation of the standard presents a hazard. To the extent that FMP, relying on *Pratt & Whitney Aircraft Div. v. Secy. of Labor*, 649 F.2d 96, 104 (2d Cir. 1981) (“*Pratt & Whitney I*”) (setting forth significant risk of harm test for existence of hazard under OSH Act), argues that the Secretary failed to establish the *existence of a hazard* under the latter standard, we find it unnecessary to reach that argument because we find that the Secretary failed to establish employee *exposure* to the cited conditions.

⁵See also *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1078 note 6, 1993-95 CCH OSHD ¶ 30,699, p. 42,605 note 6 (No. 90-2148, 1995); *Carpenter Contracting Corp.*, 11 BNA OSHC 2027, 2029-31 & note 3, 1984-85 CCH OSHD ¶ 26,950, pp. 34,563-64 & note 3 (No. 81-838, 1984); *Otis Elevator Co.*, 6 BNA OSHC 2048, 2050, 1978 CCH OSHD ¶ 23,135, p. 27,952 (No. 16057, 1978).

The mere fact that it was not impossible for an employee to insert his hands under the ram of a machine does not itself prove that the point of operation exposes him to injury. Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees.

9 BNA OSHC at 1097-98, 1980 CCH OSHD at p. 30,846. The Commission concluded that the Secretary had not established employee exposure to the points of operation on Rockwell's machines, due to the extremely slow rate of descent of the plungers and the fact that they were constantly under the employee's control.⁶

Accordingly, under *Gilles & Cotting* and *Rockwell*, in order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.⁷ We emphasize that, as we stated in *Rockwell*, the

⁶See also *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1147, 1993 CCH OSHD ¶ 30,045, p. 41,239 (No. 88-1250, 1993) (evidence of exposure to hazard under section 1910.212(a)(1), was insufficient where "likelihood of an injury [is] negligible"), *rev'd in part on other grounds*, 25 F.3d 653 (8th Cir. 1994); *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421-23, 1991-93 CCH OSHD ¶ 29,551, p. 39,954 (No. 89-553, 1991) (violation of section 1910.212(a)(1) cannot be found where operator would have no reason to put hands close enough to unguarded parts of machinery to be exposed to hazard and possibility of exposure of employee walking past machine "would be remote"); *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, pp. 38,883-84 (No. 86-247, 1990) (one section 1910.212(a)(1) item vacated where employees had no reason to put their hands in danger zone and "it would be difficult for them to do so;" another section 1910.212(a)(1) item affirmed where employees routinely placed their hands in immediate vicinity of nip points and "could inadvertently put their hands into it); *Skydyne, Inc.*, 11 BNA OSHC 1753, 1755, 1983-84 CCH OSHD ¶ 26,761, p. 34,222 (No. 80-5422, 1984) (exposure under section 1910.212(a)(3)(ii) not shown where CO did not witness operation, was unable to present evidence on distance of operators' hands from points of operation or rate of descent of moving part, no reason appeared for employee to place hand under it, and there were no prior accidents).

⁷As we noted in *Gilles & Cotting*, the scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. *Gilles & Cotting*, 3 BNA OSHC at 2003, 1975-76 CCH OSHD at p. 24,425. Here, the zones of danger presented are the unguarded points of operation and camshafts. Our inquiry then is whether the employees' proximity to the machines makes it reasonably predictable that they will enter these zones of danger by slipping or falling.

inquiry is not simply into whether exposure is theoretically possible.⁸ Rather, the question is whether employee entry into the danger zone is reasonably predictable. *Gilles & Cotting*, 3 BNA OSHC at 2003, 1975-76 CCH OSHD at p. 24,425.

Applying this test of exposure to the citations before us, we find that the Secretary has failed to establish exposure under either standard.

1. Point of operation items

CO Kowalski admitted that neither the toolmakers nor the machine operators are exposed to the presses' points of operation during the course of their normal work duties. His only concern was inadvertent entry into a point of operation due to a slip or fall. He admitted, however, that such a slip or fall near a press is improbable.⁹ The judge agreed, finding it highly unlikely that an employee would slip or fall in such a way that his hand would actually enter a point of operation, given that the points of operation were 3 feet or more above the floor and most had only a ¼-inch opening.

⁸The Secretary contends that exposure means "physically possible for an employee to put his hand in the hazardous area, even if by inadvertence or improper performance of his job" (Sec. Brief at 9), except where such contact is "freakish or suicidal" (Oral Argument Tr. 24), and that her interpretation is entitled to deference under *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144 (1991). Whether an employee is exposed to a hazard or a noncomplying condition is part of what the Secretary must prove to establish a violation of the Act. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,899 (No. 78-6247, 1981), *aff'd in part, remanded in part*, 681 F.2d 69 (1st Cir. 1982). It is unnecessary for us to decide whether the Secretary could eliminate her burden under the Act with respect to establishing exposure on a case-by-case basis by making the finding of exposure inherent in the standard itself, since she has not done so in the two standards at issue here. The Secretary's interpretation of these standards to mean that, in effect, guarding is required unless employee contact would occur only under freakish circumstances does not so much carry the Secretary's burden to prove exposure as eliminate it. Accordingly, her position is not entitled to deference under *CF & I*.

⁹Because of FMP's many precautions, the judge rejected the Secretary's argument that FMP's use of machine lubricant somehow contributed to the likelihood of a slip and fall incident occurring. Each press sits inside a containment pan which catches any lubricant that drips from machine parts. The splash guards on some of the presses help keep oil from spraying out onto the floor. There are absorbent materials around the containment pans. Those materials, called "oil socks" or "oil pigs," contain or absorb oil in the event of a spill or leakage. Also, the eyelet department floor is mopped at least once per shift and any oil spillage onto a floor is cleaned up as soon as possible. As mentioned, Kowalski found the floors "generally clean" and not citable during his inspection.

[T]he likelihood of inadvertent contact with any of the unguarded presses' points of operation seems remote at best. Indeed, the evidence demonstrates that rows of barrels placed at the rear of each press to collect scrap metal make access at this point extremely difficult. In addition, the designated aisles in this area, measured by FMP's safety coordinator as six feet wide, allow more than enough space for an employee to pass the rear of an operating press without danger.

Similarly, the work areas at the front of each press are large enough to allow employees to travel between assigned machines and maintain a distance of at least two feet from any point of operation. Indeed according to FMP's safety coordinator, it is about 18 feet from the front of one press to the front of the press directly across from it. Furthermore, while the boxes and/or barrels placed at the front of each press to collect finished parts as they exit the machine do not appear to restrict an employee's ability to traverse this large area, like the barrels at the rear of the press, they do serve to limit direct access to a point of operation.

(Citations omitted.)

We agree with the judge's findings.¹⁰ As he pointed out, his findings regarding FMP's unguarded points of operation apply with at least equal force to those that were partially guarded. Based on this record, therefore, we find that it is not reasonably predictable that an employee will be in the zone of danger presented by the presses' points of operation at any time, and we vacate this citation item.

¹⁰The expert testimony produced by each side does not change the result. The Secretary presented a former OSHA CO and regional safety engineer, Edward Bajakian, who since had become a safety and health officer with the U. S. Fish and Wildlife Service. Mr. Bajakian, who had seen pictures of FMP's presses but had not visited the workplace, testified that sound safety engineering principles call for universal guarding of points of operation and horizontal shafting on presses.

However, FMP presented a very experienced consulting engineer to the metal forming industry, William Roorda. He was a member of the American National Standards Institute ("ANSI") Committee that wrote the 1988 edition of their safety standard for Mechanical Power Presses (ANSI B11.1 (1988)). Mr. Roorda, who conducts safety inspections in the industry to determine compliance with safety standards, spent six hours inspecting FMP's presses. In his professional opinion, there was no employee exposure to the unguarded point of operation or camshafts, and there were no hazards of slipping, tripping, or falling in the area of those presses.

2. Camshaft items

As with the point of operation hazards, the Secretary's only concern as to the unguarded shafts is inadvertent contact with a rotating shaft in the event of a slip or fall. Kowalski acknowledged that the barrels stored against the back of FMP's presses made it impossible for an employee to contact the upper shafts (five to seven feet above the floor) from that side in the event of a slip or fall. Nor could Kowalski think of a way an employee could contact the lower shafts from the back, again due to the barrels. On the front, employees stood no closer than 18 to 24 inches away from the presses in the course of their work. Employees walking by the presses were farther away. Kowalski saw no employee walk closer than two feet from a press. There was no showing that an employee might contact an upper camshaft from the front in the event of a slip or fall. As to the lower shafts on the front, we agree with the judge's summary:

[T]he likelihood of inadvertent contact is far too remote to support a finding of employee exposure. Indeed, when walking between machines or performing tasks that require them to come in close proximity to a press, employees remain at least one to two feet away from a machine's lower shaft. Also, the splash guards installed on some of the presses, as well as the barrels and other containers positioned at the front of each machine to collect finished parts, serve to block easy access to an exposed lower shaft. These conditions, coupled with the fact that the lower shaft is about two feet above the floor and somewhat recessed from the outer edge of the containment which borders the press, render inadvertent contact highly unlikely, even if an employee were to slip and fall in this area.

(Citations omitted.)

Accordingly, we find that the evidence does not show that it is reasonably predictable that any employee will slip or fall so as to contact either the upper or lower shafting on the cited presses. We therefore vacate the alleged violation of section 1910.219(c)(2).¹¹

¹¹We further note that there was no evidence of any injuries in this department from contact with an unguarded shaft during the 16 or more years the plant had been in operation.

CONCLUSION

For the reasons set forth above, we vacate the alleged violations of sections 1910.212(a)(3)(ii) and 1910.219(c)(2).

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: November 7, 1997