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SECRETARY OF LABOR, Complainant, v. MINIATURE NUT AND SCREW CORP., Respondent.	OSHRC Docket No. 93-2535

DECISION

Before: WEISBERG, Chairman; MONTOYA, Commissioner.

BY THE COMMISSION:

Miniature Nut and Screw Corporation ("MiniNut") is a small employer in Newington, Connecticut, that manufactures die-cast zinc fasteners. After an inspection by the Occupational Safety and Health Administration of the Department of Labor ("OSHA"), the Secretary of Labor issued a citation alleging that MiniNut was in violation of a number of OSHA standards governing occupational noise exposure and machine guarding promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Following a hearing, Administrative Law Judge Robert A. Yetman issued a decision in which he affirmed the noise exposurre items but reduced the characterization to other-than serious and vacated some of the items alleging violations of machine-guarding standards. The judge's decision was directed for review pursuant to section 12(j) of the Act, 29 U.S.C. § 661(j). We reverse the judge's characterization of

two of the noise violations and modify the penalty assessed for those violations. We affirm the judge's vacation of seven items alleging machine-guarding violations.

I. NOISE EXPOSURE: HEARING CONSERVATION VIOLATIONS.

The judge found that MiniNut had violated four subsections of the occupational noise exposure standard at 29 C.F.R. § 1910.95. Item 2a of the citation, which is not on review, alleged that MiniNut was in violation of section 1910.95(c)(1)[1] because it did not have a hearing conservation program as described in paragraphs (c) through (o) of 29 C.F.R. § 1910.95. The items on review, items 2b, 3a, and 3b, then alleged violations of three more specific subsections: 29 C.F.R. §§ 1910.95(g)(1), failure to conduct annual audiometric testing; 1910.95(k)(1), failure to have a training program for employees exposed to excessive noise; and 1910.95(l)(1), failure to post and have available for employees a copy of the noise exposure standard.[2] The issue before the Commission is

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[1]That standard provides:

> **§ 1910.95 Occupational noise exposure.**
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> . . . .
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> (c) *Hearing conservation program.* (1) The employer shall administer a continuing, effective hearing conservation program, as described in paragraphs (c) through (o) of this section, whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A scale (slow response) or, equivalently, a dose of fifty percent. For purposes of the hearing conservation program, employee noise exposures shall be computed in accordance with appendix A and Table G-16a, and without regard to any attenuation provided by the use of personal protective equipment.

[2]Those sections provide:

> **§ 1910.95 Occupational noise exposure.**
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> . . . .
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> (g) *Audiometric testing program.* (1) The employer shall establish and maintain an audiometric testing program as provided in this paragraph by making audiometric testing available to all employees whose exposures

(continued...)

not whether the judge properly found that MiniNut committed these violations but whether he erred in reducing the characterization of the three items on review from serious, as alleged by the Secretary, to other-than-serious, and in assessing a penalty only for item 2a.

The degree of the violations.

A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), "if there is a substantial probability that death or serious physical harm could result." That provision does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur. *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1315, 1991 CCH OSHD ¶ 29,498, p. 39,804 (No. 89-2253, 1991); *Natkin & Co.*, 1 BNA OSHC 1204, 1205, 1971-73 CCH OSHD ¶ 15,679, pp. 20,967-68 (No. 401, 1973). Here, the judge found the four violations not to be serious because, by providing its employees with hearing protection, MiniNut had satisfied what the judge considered to be the most important requirement of the hearing conservation program.

MiniNut argues that the judge's finding was correct because the failure to conduct audiometric testing, to perform training, and to provide employees a copy of the occupational noise exposure standard would not cause hearing loss. This reasoning misses the point. Periodic audiometric testing makes it possible to detect hearing loss and

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[2](...continued)

> equal or exceed an 8-hour time-weighted average of 85 decibels.
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> . . . .
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> (k) *Training program.* (1) The employer shall institute a training program for all employees who are exposed to noise at or above an 8-hour time-weighted average of 85 decibels, and shall ensure employee participation in such program.
>
> . . . .
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> (l) *Access to information and training materials.* (1) The employer shall make available to affected employees or their representatives copies of this standard and shall also post a copy in the workplace.

implement protective measures to prevent further loss. *Reich v. Trinity Indus.*, 16 F.3d 1149, 1151 (11th Cir. 1994). The Commission has characterized hearing loss as serious physical harm within the meaning of section 17(k) of the Act. *See Sun Shipbuilding & Drydock Co.*, 2 BNA OSHC 1181, 1183, 1974-75 CCH OSHD ¶ 18,537, p. 22,519 (No. 268, 1974). An employer's failure to conduct audiometric testing may allow hearing loss to go undetected, thereby preventing the employee and his employer from becoming aware of the situation and taking appropriate remedial measures. We therefore find that the failure to make audiometric tests available to employees *can* result in serious physical harm.

Although subsequent audiometric testing of its employees by MiniNut resulted in readings that were "normal," in the absence of prior test results we have no way of knowing how much or how little the employees' hearing had deteriorated over time. We cannot determine, for example, whether any of MiniNut's employees started with superior hearing which has now deteriorated to the low end of the "normal" range. The failure to train employees properly also serves to perpetuate a situation like the one at MiniNut's plant, where, for example, one of the employees wearing hearing protection was not wearing it properly. Contrary to MiniNut's claim, the lack of proper training *could* lead to hearing loss, since the employee would not be aware that he was not wearing the protection properly and was therefore not protected from excessive levels of noise. We therefore conclude that items 2b and 3a were serious violations and hold that the judge erred in characterizing items 2b and 3a as other-than-serious.

We agree, however, with the judge's determination that item 3b was not a serious violation because we find no evidence in the record to support a finding that death or serious physical harm is the likely result of MiniNut's failure to have available and post a copy of the noise standard.

Penalty.

The Secretary proposed combined penalties of $1,500 for items 2a and 2b and $1,500 for items 3a and 3b. The judge assessed a penalty of $300 for item 2a by itself,

and assessed no additional penalty for items 2b, 3a, and 3b. Under section 17(b) of the Act, 29 U.S.C. § 666(b), however, an employer who commits a serious violation "*shall* be assessed a civil penalty," while an employer who commits a violation that is not serious "*may*" be assessed a penalty, under section 17(c), 29 U.S.C. § 666(c). Having found that two of the violations before us are serious violations, we reconsider the penalty to reflect this higher characterization.

Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1006-07, 1995 CCH OSHD ¶ 30,635, p. 42,444 (No. 92-424, 1994). Normally, the most significant consideration in assessing a penalty is the gravity of the violation, which includes the number of employees exposed to the hazard, the duration of their exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Id.* Because the judge did not discuss these penalty factors in deciding not to assess any penalty for items 2b, 3a, and 3b, we must make that assessment ourselves.

As to size, MiniNut is a very small employer, having only ten employees. Its prior history shows that the company had been cited for a noise violation ten years earlier, which led it to issue its employees the hearing protection which the compliance officer observed employees wearing. At the time of the earlier citation, the company had designated one employee to be in charge of safety and health matters, but that employee had since died, and his duties had been assumed by an individual who was not aware of many of the company's legal obligations under the Act, even though he was charged with such matters. While the company cooperated during the inspection and was providing its employees some level of hearing protection, we cannot give it full credit for good faith because it was not diligent in determining its legal duties. We consider these violations to be of low gravity, however, because only two employees were exposed to noise levels in excess of the standard's action level and they did wear hearing protection, although it

was not fitted properly. MiniNut has introduced evidence that audiometric tests performed after the inspection in question here showed that the hearing of the employees tested was in the normal range, which suggests that the degree of harm was low.

The three items before us involve violations of separate components of a hearing conservation program. As noted, MiniNut was cited for failure to have the entire hearing conservation program in item 2a, which is not on review. As required elements of a hearing conservation program, the three items before us are subsumed in the violation cited in item 2a. The Secretary apparently recognized this to some degree when he proposed a single penalty for items 2a and 2b and another combined penalty for items 3a and 3b, although he has not explained his rationale for doing so. We therefore cannot say that the judge erred in assessing a single penalty for the four noise items.

Having independently considered the penalty factors as to each of the three items on review, as discussed above, we consider it appropriate to assess a total penalty of $750 for all four violations of the occupational noise exposure standard, items 2a, 2b, 3a, and 3b, rather than the $300 assessed by the judge.[3]

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[3]Commissioner Montoya notes that, given that an adequate hearing conservation program, which was the subject of item 2a, would have abated all the violations here, the judge properly supported his decision to group these items for penalty purposes by citing *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981), and *Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1118, 1986-87 CCH OSHD ¶ 27,829, p. 36,430 (No. 84-696, 1987); *cf.*, *Hoffman Constr. Co.*, 6 BNA OSHC 1272, 1275-76, 1977-78 CCH OSHD ¶ 22,489, p. 27,120 (No. 4182, 1978) (when Secretary cites multiple violations of same standard, Commission has discretion to assess single penalty).

Chairman Weisberg agrees that the Commission may, and in this case appropriately should, assess a single penalty for all four violations of the noise exposure standard. In this regard, he notes that the three items on review are constituent elements subsumed in the overall hearing conservation program required under the general provision cited in item 2a, and that even the Secretary chose to combine the noise exposure items into two groups for penalty purposes. He does not, however, rely on *H.H. Hall Construction Co.*, or on overlapping abatement.

II. MACHINE GUARDING ITEMS.

The Secretary also cited MiniNut for violating three subsections of the machine-guarding standard at 29 C.F.R. § 1910.212, and four subsections of the standard at 29 C.F.R. § 1910.219, which governs mechanical power-transmission devices including belts and pulleys, sprockets and chains, and gears. The judge vacated all seven items on review because he found that MiniNut's employees were not exposed to the cited conditions. For the reasons below, we affirm the judge's disposition of these items.

In order to prove that MiniNut violated an OSHA standard, the Secretary must prove either that MiniNut's employees had actually been exposed to the violative condition or that it was reasonably foreseeable that they would have access to the violative conditions. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079, 1995 CCH OSHD ¶ 30,699, p. 42,605 (No. 90-2148, 1995), *appeal filed*, 95-6022 (5th Cir. Apr. 11, 1995). Access to the condition may be shown by establishing that it is reasonably predictable that, during the course of their normal work duties, employees might be in the "zone of danger" posed by the condition. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1285, 1993 CCH OSHD ¶ 30,148, p. 41,477 (No. 91-862, 1993), citing *Pennsylvania Steel Foundry & Machine Co.*, 12 BNA OSHC 2017, 1986-87 CCH OSHD ¶ 27,671 (No. 78-638, 1986), *aff'd*, 831 F.2d 1211 (3d Cir. 1987). The Secretary must show employee access to the condition by a preponderance of the evidence. *Olin Constr. Co. v. OSHRC*, 525 F.2d 464 (2d Cir. 1975). In each of the items below, we agree with the judge that the Secretary failed to prove the degree of exposure requisite to establish a violation.[4]

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[4]Commissioner Montoya would add that, as to each machine-guarding item on review, the Commission's findings that the Secretary has failed to prove employee exposure are supported by the absence of accidents or injuries at any of the machines cited by the Secretary. Although the lack of injuries is not dispositive of whether there was employee exposure to a violative condition, *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1150, 1993 CCH OSHD ¶ 30,045, p. 41,243 (No. 88-1250, 1993), *rev'd in part on unrelated grounds*, 25 F.3d 653 (8th Cir. 1994); *see also Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1524, 1994 CCH OSHD ¶ 30,303, p. 41,760 (No. 90-2866, 1993), the

(continued...)

Item 8.

Item 8 of the citation alleged that MiniNut had violated the machine-guarding standard at 29 C.F.R. § 1910.212(a)(1)[5] in that a flat die thread roller used approximately once a week to put threads on zinc screws had an unguarded ingoing nip point where a cam met a roller. The compliance officer hypothesized that MiniNut's operator was exposed to the hazard posed by this condition because she might reach for a small brush lying on a platform near the unguarded nip point and become entangled in the nip point. The brush was at the back of the machine, opposite the operator's work station, so that the bulk of the machine itself was between the operator and the brush. Although the record establishes that the brush was used to brush away the small metal chips that resulted from the threading process, there was no evidence that the brush would be used

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[4](...continued)
absence of injuries is relevant evidence on the question of whether employees were exposed to a hazard. *Rockwell Int'l Corp.*, 9 BNA OSHC 1092, 1098, 1980 CCH OSHD ¶ 24,979, p. 30.846 (No. 12,470, 1980); *cf.*, *Department of Labor v. OSHRC (Goltra Castings)*, 938 F.2d 1116, 1118 (10th Cir. 1991) (low injury rate has bearing on whether employer has notice of need for protection), citing *Owens-Corning Fiberglass Corp. v. Donovan*, 659 F.2d 1285, 1290 (5th Cir. 1981); *ConAgra Flour Milling*, 16 BNA OSHC at 1142, 1993 CCH OSHD at p. 41,234 (absence of injuries supports finding that reasonable person would not perceive hazard requiring protection); *Armour Food Co.*, 14 BNA OSHC 1817, 1820, 1987-90 CCH OSHD ¶ 29,088, p. 38,881 (No. 86-247, 1990) (lack of employee injuries suggests that no hazard was present); *Pratt & Whitney Aircraft Group*, 12 BNA OSHC 1770, 1772, 1986-87 CCH OSHD ¶ 27,564, p. 35,793 (No. 80-5830, 1986) (injury records relevant to presence or absence of hazard), *aff'd without published opinion*, 805 F.2d 391 (2d Cir. 1986).

[5]The cited standard provides:

> **§ 1910.212 General requirements for all machines.**
> (a) *Machine guarding*—(1) *Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc.

while the machine was running. Consequently, the judge found that there was no evidence of employee exposure to the unguarded nip point. We conclude that the judge correctly vacated this item because the Secretary has failed to establish that MiniNut's employees would be in the zone of danger.

Item 9.

Item 9 of the citation alleged that MiniNut had violated the standard at 29 C.F.R. § 1910.212(a)(3)(ii)[6] by failing to guard two different kinds of machines. The judge found a violation as to one of the machines, and MiniNut did not seek review of that finding. The judge vacated the citation as to three staking machines in the secondary room. That portion of his decision is before us.

The staking machines are small punch presses that sit on a table or counter. The employee inserts a metal fastener into a slot then presses a foot pedal to activate the machine. Once the ram has descended and completed its operation, the part is automatically blown out by compressed air. Each of them has a guard between the operator and the point of operation, a "Protecto Switch" made and installed by the manufacturer. The Protecto Switch is a bar below the ram that descends as the ram descends and will stop the ram if it encounters an obstruction. The compliance officer described this bar as a "partial" guard, because it did not go all the way around the ram.

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[6]That section 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.

He was concerned because he saw the operator reach around the guard and put her hand into the vicinity of the point of operation. The compliance officer did not state whether the ram was ascending or descending when this occurred, or even whether the machine was operating at all. He did not state how fast the ram moved, or exactly what the operator was doing when she reached around the guard.

On this evidence, the judge vacated the citation as to the staking machines because he found that the Secretary had failed to establish employee exposure to injury. We agree. On the record before us, we cannot find that a preponderance of the evidence supports a finding that the employee's hand was in a zone of danger. We therefore affirm the judge's disposition of this item as to the three staking machines.[7]

Item 10.

Item 10 of the citation alleged that MiniNut had violated section 1910.212(a)(4)[8]

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[7]Commissioner Montoya notes that she would not find a violation of section 1910.212(a)(3)(ii) even if the Secretary had proved that MiniNut's employees were exposed to the condition cited in this item, because the Secretary has not proved that MiniNut knew or should have known that the operator was avoiding the manufacturer's guard. Knowledge of the violative condition, either actual or constructive, is an element of the Secretary's burden of proving a violation: the Secretary must prove either that the employer knew of the violative condition or that it could have known with the exercise of reasonable diligence. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1386, 1995 CCH OSHD ¶ 30,909, p. 43,028 (No. 92-262, 1995), *appeal dismissed without published opinion*, No. 95-1008, (D.C. Cir. Jan. 2, 1996). Here, the compliance officer testified that the operator told him that she had reached around the guard before. However, there is no indication of how long she had been doing this, how frequently she did it, or whether any MiniNut supervisor was ever present when she did it. In the absence of sufficient evidence to support a finding that MiniNut knew or should have known that the operator was circumventing the guard, the Commission could not find a violation even if the Secretary had established employee exposure to the cited condition.

[8]That section provides:

> **§ 1910.212 General requirements for all machines.**
> (a) *Machine guarding—*
> . . . .

(continued...)

by failing to guard the revolving drums on 5 tumbling machines, four in the tumbling department and one in the shipping and receiving department.

The machine in the shipping and receiving department is used for washing the fasteners produced in the plant, while the other four are used to break apart castings in order to separate the die-cast fasteners. However, each of the machines operates much like a small cement mixer with a rotating tub. With the machine off, the operator loads the machine, sets a timer, turns the machine on, and goes to a new task, often in another part of the plant. At the end of the designated period, the machine turns itself off, after which the operator returns and unloads the tumbler by tilting the mouth forward until the load spills out into a container.

The on/off switches for two of the machines in the tumbling department were located on a wall some distance from the machines. The switches for the other two machines in that department were located on the wall behind the machines. To turn on those two machines, the operator had to walk to the side of the machine, reach out, push a button, and leave. Similarly, the switch for the tumbler in the shipping department used for washing was situated on the wall behind that machine. For the three machines whose switches were located behind them, the operator passed approximately a foot away from the machine when he reached for the switch to turn the machine on. According to the record, he then left the area. The only employee who worked in the area was the operator, although the compliance officer believed that any employee who traveled through the tumbling department or the shipping department on the way somewhere else might also be in danger.

The judge found that the operator was not exposed to the revolving drum while he loaded and unloaded the tumblers, because the machines were off, and that the operator

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[8](...continued)

> (4) *Barrels, containers, and drums.* Revolving drums, barrels, and containers shall be guarded by an enclosure which is interlocked with the drive mechanism, so that the barrel, drum, or container cannot revolve unless the guard enclosure is in place.

was not in close proximity to the machines while they were on. Upon review of the record, we agree with the judge that the Secretary has not established by a preponderance of the evidence that MiniNut's employees were or reasonably might be in the zone of danger posed by the unguarded drums. We therefore affirm the judge.

Items 12 and 13.

In item 12 of the citation, the Secretary alleged that MiniNut had violated section 1910.219(d)(1)[9] by failing to guard pulleys on a total of five machines, one tumbler and four flat die rollers. Item 13b alleged a violation of section 1910.219(e)(3)(i)[10] for failure to guard belts on the same five machines cited in item 12. Because the belts and pulleys operate together and the condition cited by the Secretary is found where they meet, we consider these two items together.

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[9]That section provides:

> **§ 1910.219 Mechanical power-transmission apparatus.**
> . . . .
> (d) *Pulleys*—(1) *Guarding.* Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section. Pulleys serving as balance wheels (e.g., punch presses) on which the point of contact between belt and pulley is more than six feet six inches (6 ft. 6 in.) from the floor or platform may be guarded with a disk covering the spokes.

[10]That section provides:

> **§ 1910.219 Mechanical power-transmission apparatus.**
> . . . .
> (e) *Belt, rope, and chain drives*—
> . . . .
> (3) *Vertical and inclined belts.* (i) Vertical and inclined belts shall be enclosed by a guard conforming to standards in paragraphs (m) and (o) of this section.

Sections 1910.219(m) and (o) set out requirements for the materials to be used in making guards, how guards must be attached, and what they must cover.

The tumbler is one of the machines cited in item 10. There were two pulleys and one belt on the side of the machine that were covered by a guard. The guard covered the entire outer side of the pulleys and belt (the side away from the tumbler) and extended over the belts and pulleys, curving inward to cover a small portion of the side next to the tumbler. In other words, the guard covered everything except that area next to the tumbler, so that the body of the machine itself made it nearly impossible for an employee to get a hand or other extremity into the area covered by the citation. Nevertheless, the compliance officer was of the opinion that there should be a guard around this entire area because employees passing by could somehow fall or be thrown into contact with the areas cited.

The photographic exhibits demonstrate that these areas are not accessible under any normal circumstances. Because the record establishes that the operator came no closer than two feet from the cited area, which was behind the outside part of the guard, we affirm the judge's determination that the operator was not exposed to the unguarded area on the tumbler and that the existing guard was adequate to prevent accidental contact.

The other four machines cited in items 12 and 13b were Waterbury flat die rollers. These machines were very similar to each other. Two of the machines, Waterbury model 20's, were identical. The other two, Waterbury model 10's, were smaller than the model 20's and were not identical to each other because one had a flat belt, while the other had a V-belt. On each of the four machines, there was a heavy cover over the belt and pulleys; but, as on the tumbler, the side next to the machine itself was not completely enclosed.

The compliance officer believed that an employee could be exposed to a violative condition because the operator "could stand within half a foot of the belt and pulleys." However the mere fact that an employee can stand within a short distance of a cited condition does not establish exposure to that condition if there is an adequate barrier between the employee and the condition. In fact, during the hearing, the compliance officer conceded that the operator's exposure was "minimal at best." Here, the operator

would be protected from the belt and pulleys by the guard on one side of the machine, and, on the uncovered side of the belt and pulleys, the body of the machine would be between him and the moving parts.

On this evidence, the judge vacated the citation as to the Waterbury rollers, concluding that "employee exposure to the moving parts is virtually non-existent." We agree with his assessment. Accordingly, we affirm the judge's decision vacating items 12 and 13b.

Item 14.

Items 14 and 15 both involve the drive mechanisms on tumbling machines. The two tumblers cited in item 14 are gear driven, while the two cited in item 15 are chain driven. In item 14 of the citation, the Secretary alleged that MiniNut was in violation of section 1910.219(f)(1)[11] because it had unguarded gears on two tumblers in the middle room.

There was a large gear attached to the bottom of the barrel of each of the tumblers covered by this item of the citation. The diameter of the gear appears to be 12 to 16 inches less than the diameter of the barrel, so that the teeth of the gear are recessed about half that distance from the outer edge of the barrel. That gear is driven by another gear

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[11]That section provides:

> **§ 1910.219 Mechanical power-transmission apparatus.**
> . . . .
> (f) *Gears, sprockets, and chains*—(1) *Gears.* Gears shall be guarded in accordance with one of the following methods:
> (i) By a complete enclosure; or
> (ii) By a standard guard as described in paragraph (o) of this section, at least seven (7) feet high extending six (6) inches above the mesh point of the gears; or
> (iii) By a band guard covering the face of gear and having flanges extended inward beyond the root of the teeth on the exposed side or sides. Where any portion of the train of gears guarded by a band guard is less than six (6) feet from the floor a disk guard or a complete enclosure to the height of six (6) feet shall be required.

located to one side of the base of the tumbler. One of the tumblers cited here is the tumbler cited in item 10. From the photographic exhibits, it appears that the point where the two gears mesh on that machine is inside the guarded belt and pulleys, so that an employee standing on the side of the machine where the gears mesh would have the guard, belt, and pulleys between him and the gears. The photograph of the other machine indicates that there is a similar obstruction between an employee and the meshing gears and that a metal cover prevents contact with the top half of the gear on the bottom of the barrel.

Although the compliance officer surmised that the operator would be in the vicinity of the machine while it was running, the company's evidence indicates that this is not the case. The evidence also does not show that the employee has to go near the machine to turn it off, because it is turned off by a timer. Even the compliance officer testified during his explanation of his calculations for a proposed penalty that there was "minimal access" to this condition. Accordingly, we find that the judge did not err in finding that MiniNut's employees were not exposed to the condition cited by the Secretary.

Item 15.

Item 15 alleged that MiniNut was in serious violation of section 1910.219(f)(3)[12] by having unguarded sprocket wheels and chains on two tumblers in the rear room. Each of the two tumblers cited in this item has a large sprocket attached to its bottom, a similar location to that of the gears cited in the last item. The main distinction between the

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[12]That section provides:

> **§ 1910.219 Mechanical power-transmission apparatus.**
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> . . . .
>
> (f) *Gears, sprockets, and chains—*
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> . . . .
>
> (3) *Sprockets and chains.* All sprocket wheels and chains shall be enclosed unless they are more than seven (7) feet above the floor or platform. Where the drive extends over other machine or working areas, protection against falling shall be provided. This subparagraph does not apply to manually operated sprockets.

tumblers cited in this item and the ones in item 14 is that the teeth of the sprockets mesh with a chain instead of a gear. The sprocket and chain assemblies cited here resemble larger versions of the sprocket and chain on a bicycle.

The exhibits and testimony persuade us that the judge correctly found that MiniNut's employees are not exposed to the condition cited here. Although the compliance officer testified that the machine operator worked within a foot of the tumblers, the thrust of his testimony was that the operator stood within a foot of the tumblers when he was filling and emptying them. At that stage of the operation, however, the machines would be turned off, and the operator would not be exposed to any danger from the cited condition.

The points where the chain crossed the two sprocket wheels were recessed several inches from the outer edge of the bottom of the barrel of the tumbler. The exhibits show that one of the tumblers had a triangle-shaped metal cover that prevented access to this area. Although the other tumbler did not have a guard in place during the inspection, the evidence discloses that the guard for that machine had been removed in order to repair a malfunction in the tumbler, and that the machine could not be operated until the repairs had been made. A preponderance of the evidence indicates that the machine had not been used without the guard, so MiniNut's employees had not been exposed to the hazardous condition. There is also no evidence to suggest that the guard would not be replaced when the repairs were finished, before the machine was used. Accordingly, we find that the judge did not err in vacating this item on the basis that the Secretary had failed to prove that MiniNut's employees were exposed to the cited condition.

III. CONCLUSION.

For the reasons set out above, we find that the judge erred in finding that items 2b and 3a, which alleged violations of 29 C.F.R. §§ 1910.95(g)(1) and 1910.95(k)(1), were not serious. We therefore affirm those items as serious violations. We find that a total penalty of $750 is appropriate for the four violations of the occupational noise exposure standard, sections 1910.95(c)(1), 1910.95(g)(1), 1910.95(k)(1), and 1910.95(l)(1). We

affirm the judge's vacation of items 8, 9, 10, 12, 13b, 14, and 15 of the citation, which alleged violations of the machine-guarding standards at 29 C.F.R. § 1910.212 and 29 C.F.R. § 1910.219.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Velma Montoya
Velma Montoya
Commissioner

Dated: February 23, 1996

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Office of
Executive Secretary

Phone: (202) 606-5100
Fax: (202) 606-5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-2535
MINIATURE NUT AND SCREW,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 23, 1996. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Date: February 23, 1996

Ray H. Darling, Jr.
Executive Secretary

93-2535

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick
Office of the Solicitor, U.S. DOL
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Barrett A. Metzler, President
Northeast Safety Management, Inc.
P.O. Box 330733
West Hartford, CT 06133

Robert A. Yetman
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR
Complainant,
v.
MINIATURE NUT & SCREW CORP.
Respondent.

OSHRC DOCKET
NO. 93-2535

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 5, 1994. The decision of the Judge will become a final order of the Commission on November 4, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before October 26, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: October 5, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2535

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. MINIATURE NUT AND SCREW, Respondent.	OSHRC DOCKET NO. 93-2535

Appearances:

Gail Glick, Esq.
Office of the Solicitor
U.S. Department of Labor

For Complainant

Barrett A. Metzler, CSP
Northeast Safety Management, Inc.
West Hartford, CT

For Respondent

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under §10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.*, ("Act"), to review citations issued by the Secretary of Labor pursuant to §9(a) of the Act and a proposed penalty assessment thereon issued pursuant to §10(a) of the Act.

On September 8, 1993, the Secretary issued citations to Miniature Nut and Screw, ("Miniature"), alleging that Serious and Other Than Serious violations occurred at Respondent's worksite during an inspection conducted by the Occupational Safety and Health Administration during the period July 22, 1993 to August 12, 1993. The Serious

citation alleges nineteen violations with a total proposed penalty of $12,300 and the Other citation alleges five violations with a zero total proposed penalty. A timely notice of contest was filed by Respondent. The Secretary has filed a Complaint incorporating the citations and Respondent answered by admitting the jurisdictional allegations in the Complaint and denying the alleged violations. At the hearing, the Secretary withdrew Items 1 and 13(a) of Serious Citation No. 1, and Respondent withdrew its notice of contest as to Item 11 of Serious Citation No. 1 in exchange for a penalty reduction to $225 for that item. Respondent withdrew its notice of contest with respect to Items 1,4 and 5 of Other Citation No. 2 (Tr. 198), and the Secretary withdrew Items 2 and 3 of that citation in his Post-hearing Brief. The parties have submitted their Post-hearing Briefs and the matter is now ready for decision.

Respondent is a small family-owned manufacturing company engaged in the manufacture of zinc fasteners and, at the time of the inspection, had ten employees (Tr. 12) with eight full-time production employees (Tr. 303). A general schedule inspection of this firm was conducted by a representative of the Occupational Safety and Health Administration on July 22, 1993 with a follow-up visit on August 12, 1993 to conduct noise sampling. As a result of the inspection, Respondent was cited for the following alleged violations:

Serious Citation No. 1, Item 2 (a):

> 29 CFR 1910.95(c)(1): A continuing, effective hearing conservation program as described in 29 CFR 1910.95(c) through (n) was not instituted when employee noise exposures equaled or exceeded an 8-hour timeweighted average sound level (TWA) of 85 dBA:

On August 12, 1993, Compliance Officer Wulff conducted a noise survey at Respondent's workplace and determined that noise levels exceeded 85 dBA as a time-weighted average over an eight-hour period in the tapping and die casting areas. Two employees working in these areas were exposed to those noise levels. Respondent conceded at the hearing that it did not have a hearing conservation program at the time of the inspection as required by the aforesaid standard (Tr. 308-310, Respondent's Brief, p.5). Respondent argues, however, that the violation should not be categorized as a serious

violation since the employees were provided with, and wore, hearing protection (Tr. 24, 236). As a result of an inspection conducted by the State of Connecticut Department of Labor during 1983, Respondent became aware of the high noise levels and issued a notice to its employees that hearing protection was required to be worn by employees working in those areas (Tr. 315). Although Respondent concedes that it failed to maintain a hearing conservation program which complied fully with the requirements of the cited standard, it did provide and require the use of hearing protection which constitutes the "most important aspect of the program". *Central Brass Manufacturing Co.*, 13 BNA OSHC 1609, 1610. Accordingly, the citation is affirmed as an Other Than Serious violation. In consideration of the four criteria for assessing a penalty, *i.e.,* the size of the employer's business, the gravity of the violation, good faith and prior history, it is concluded that the business is small and the gravity of the violation is low. Moreover, Respondent had taken steps to protect its exposed employees after it became aware of the noise problem during a 1983 inspection. For the foregoing reasons, a penalty of $300 is assessed for the violation.

Serious Citation No. 1, Item 2(b)

> 29 CFR 1910.95(g)(1): An audiometric testing program was not established and maintained for all employees whose noise exposure equaled or exceeded an 8 hour time weighted average of 85 DBA:

Respondent concedes that it failed to comply with the audiometric testing requirements of the standard (Tr. 308-310). Audiograms were given to employees during 1983; however, annual tests had not been conducted since that time. The Secretary has "grouped" this violation with Item 2(a), presumably because provisions of this standard must be complied with pursuant to 29 CFR 1910.95(c)(1); the standard cited as Item 2(a). Accordingly, for the reasons set forth above, this violation is reclassified as Other Than Serious with no additional penalty.

Serious Citation No. 1, Item 3(a)

> 29 CFR 1910.95(k)(1): A training program was not instituted for all employees who were exposed to noise at or above an 8 hour timeweighted average of 85 dBA:

Serious Citation No. 1, Item 3(b):

> 29 CFR 1910.95(l)(1): A copy of 29 CFR 1910.95 was not made available to affected employees or their representatives:

The standard set forth at 29 CFR 1910.95(c)(1) cited by the Secretary as Item 2(a) above requires employers to comply with paragraphs (c) through (o) of that section. The Secretary included a violation of 95(g) with the 95(c)(1) allegation and proposed one penalty for both violations. Items 3(a) and 3(b) are similarly included within 95(c)(1) as requirements for a hearing conservation program. As noted above, Respondent has conceded that it failed to establish a hearing conservation program as required by 95(c)(1) other than providing and requiring the use of hearing protection. For reasons which are not stated in the record, the Secretary decided to charge Respondent with a separate violation for 95(k) and 95(l) with an additional proposed penalty. There is no justification in the record for assessing a penalty for these violations in addition to a penalty for violating the comprehensive requirements of 95(c)(1). Accordingly, these items are reclassified as Other Than Serious violations. No additional penalty is assessed. *H.H. Hall Construction Company,* 10 BNA, OSHD 1042, 1046; *Cleveland Consolidated, Inc.*, 13 BNA OSHD 1114, 1118

Serious Citation No. 1, Item No. 4

> 29 CFR 1910.133(a)(1): Protective eye equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment:

Respondent's worksite contains 21 die cast machines which form molten zinc into various parts. The molten zinc is contained in a pot attached to each machine and solid zinc bars are placed in the pots to replenish the zinc as it is used in the manufacturing process. Each pot is approximately six inches deep, eighteen inches long and seven inches wide. The solid zinc bars are manually lowered into the pot by a chain held by an employee. The Compliance Officer testified that the employee would be exposed to splashing molten zinc in the event that the chain slipped out of his hand and the zinc bar fell into the pot. According to the Compliance Officer, the employee, Joseph Gilchrist, told him that he had been splashed and burned by molten zinc in the past (Tr. 44). Moreover, the Compliance

Officer observed burn holes in Mr. Gilchrist's shirt. The Respondent's Safety and Health Director, Graham Smith, testified that he was unaware of any zinc splashing and no injuries had been reported as a result of molten zinc burns. Mr. Smith acknowledged, however, that protective eye shields should be worn in the die cast area "for the safety factor" (Tr. 320), and eye protection was available at the worksite (Tr. 46, 397). Based upon the foregoing, it is concluded that employees working in close proximity of the molten zinc pots are exposed to the hazard of splashing molten zinc and appropriate eye protection must be worn. Accordingly, the violation is affirmed as a Serious violation. In view of the low gravity factor, the exposure of one employee to the hazard, and the small size of the employer, a penalty of $500 is assessed.

Serious Citation No. 1, Item No. 5

> 29 CFR 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees [are engaged] in activities covered by this section:
>
> ESTABLISHMENT: THE EMPLOYER DID NOT ENSURE THAT SPECIFIC ENERGY CONTROL PROCEDURES WERE DEVELOPED AND IMPLEMENTED FOR EACH TYPE OF EQUIPMENT TO BE LOCKED OUT OR TAGGED OUT INCLUDING, BUT NOT LIMITED TO. TUMBLERS, TAPPERS, DIE CASTING MACHINES, AND FLAT DIE THREAD ROLLERS.

Respondent's worksite contains die cast machines, tumblers, tappers, flat die thread rollers and punch presses which require occasional repair. Most of the repairs are performed by Graham Smith, an owner of the firm. Other repairs are performed by "outside services" (Tr. 325); however, employee Gilchrist has performed non-electrical repairs on the die cast machines. Mr. Smith acknowledged at the hearing that Respondent did not have a lockout/tagout procedure in place at the time of the inspection (Tr. 324). During cross-examination, the Compliance Officer who inspected the worksite, testified that electrical machines which are plug connected are not covered by the standard cited. (*See* 29 C.F.R. 1910.147(a)(2)(iii)) During his direct examination, the Compliance Officer stated that all of Respondent's machines were plug-connected (Tr. 58) and later testified that all of the cited machines are "hard wired" with the exception of the bench grinder (Tr. 61).

Graham Smith, Respondent's witness, testified that the die cast machines and the tappers are plug connected. However, Smith stated he deenergized the machines other than the die cast machines and the tappers by switching the circuit breakers off before performing repairs (Tr. 325). Thus, it is concluded that the cited machines other than the die cast machines and the tappers are "hard wired", and require the use of a circuit breaker to deenergize the machines to protect the exposed employees. Accordingly, during maintenance or servicing of those machines, Respondent is required to comply with the provisions of the standard cited. Since Respondent conceded that it had not complied with the standard at the time of the inspection, this item of the citation is affirmed. The Respondent was also aware of the hazards associated with exposure to the moving parts of the cited machines as reflected in the memorandum distributed to its employees listing those moving parts as "harmful physical agents" (Ex. R-2). Accordingly, this item is affirmed as a Serious violation. In view of the employer's size, history of no injuries, and good faith, as well as the Secretary's acknowledgement that the gravity factor is low, the proposed penalty of $450 assessed for the violation, is affirmed.

Serious Citation No. 1, Item No. 6

> 29 CFR 1910.147(c)(5)(i): Locks, tags, chains, wedges, key blocks, adapter pins, self-locking fasteners, or other hardware were not provided by the employer for isolating, securing or blocking of machines or equipment from energy sources:
>
> ESTABLISHMENT: THE EMPLOYER DID NOT PROVIDE THE HARDWARE REQUIRED TO LOCKOUT OR TAGOUT THE POWER SOURCES OF EQUIPMENT IN THE FACILITY.

Serious Citation No. 1, Item No. 7

> 29 CFR 1910.147(c)(7)(i): The employer did not provide adequate training to ensure that the purpose and function of the energy control program was understood by employees:
>
> ESTABLISHMENT: THE EMPLOYER DID NOT PROVIDE LOCKOUT/TAGOUT TRAINING TO AUTHORIZED, AFFECTED, AND OTHER EMPLOYEES.

As stated above, Respondent conceded at the hearing that, at the time of the inspection, a lockout system was not in place at the worksite as required by 29 CFR 1910.147 (c)(5)(i) (Tr. 324). Similarly, Respondent's witness, Graham Smith, acknowledges that exposed employees were not trained in lockout procedures (Tr. 326). Mr. Smith testified that he performed ninety percent of the machine repairs and he was "basically the lockout" (Tr. 325). The Secretary's brief indicates that the evidence establishing that Respondent violated 29 CFR 1910.147(c)(4)(i), (Item 5 above), also establishes a violation of the standards set forth at Items 6 and 7 of the citation. I concur with the Secretary's statement and conclude that abatement of Item 5 above by Respondent will, by necessity, abate the violations set forth as Items 6 and 7 of the citation. Accordingly, Items 6 and 7 are affirmed as Serious violations, with an additional penalty of $50 assessed for each violation.

Serious Citation No. 1, Item No. 8

> 29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by ingoing nip points:
>
> 1. TUMBLING DEPARTMENT: THE PARTS SEPARATOR IN THE BACK ROOM USED FOR SEPARATING FASTENERS, DID NOT HAVE A GUARD TO ENCLOSE THE INGOING NIP POINT(S) WHERE THE FLAT BELT MEETS THE ROLLERS.
>
> 2. SECONDARY ROOM: THE WATERBURY FLAT DIE THREAD ROLLER #10 (MACHINE #00012) DID NOT HAVE A GUARD TO ENCLOSE THE INGOING NIP POINT WHERE THE CAM MEETS THE ROLLER.

In order to establish a violation of the cited standard, the Secretary must:

> prove that a hazard within the meaning of the standard exists in the employer's workplace. *Armour Food Co.,* 14 BNA OSHC 1817, 1821, 1987-90 CCH OSHD ¶29,088, p. 38,883 (No. 86-247, 1990). In order to meet this burden, the Secretary must do more than show that it may be physically possible for an employee to come into contact with the unguarded machinery in question. Rather, the Secretary must establish that employees are exposed to a hazard as a

> result of the manner in which the machine functions and the way it is operated. *Id.; Rockwell International Corp.,* 9 BNA OSHC 1092, 1097-98; 1980 CCH OSHD ¶24,979, p. 30,846 (No. 12470, 1980). *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419 (1991).

With respect to Instance 1, above, the Secretary asserts that an employee operating a parts separating machine located in the Tumbling Department is exposed to nip points created by an unguarded moving belt located at the rear of the machine (Exh. C-6). The evidence clearly establishes that the machine in question has rotating parts and a moving belt without any guard. Respondent asserts, however, that no employee is exposed to the moving parts while the machine is in operation. Mr. Graham Smith, Respondent's Safety and Health Director, testified that employee Pacheco is the only operator for this machine, and no other employees are in the area when the machine is in operation (Tr. 332). According to Mr. Smith, the operator loads the parts to be separated into the hopper at the top of the machine. The machine is not operating when the parts are placed in the hopper (Tr. 400). Mr. Pacheco then activates the machine by turning on two electrical switches which are located approximately two feet from the machine and approximately six feet from the unguarded belt (Tr. 330). Since the machine does not need to be monitored, Pacheco leaves the area and sits at his desk located in another room (Tr. 333). Occasionally, he will return to the machine to check the finished parts which have been dropped into a barrel at the far end of the machine opposite the unguarded rotating parts (Tr. 333, Exh. C-5).

Compliance Officer Wulff testified that, during his inspection, he observed the parts separator machine in operation. His description of the machine and its operation was similar to the description given by Mr. Smith, but with less detail. The testimony of Wulff and Smith indicate that the operator comes in close proximity to the unguarded rotating parts when he is loading the hopper. At no time during his testimony did Mr. Wulff state that the belt and other rotating parts were moving during the time that the machine was loaded by the operator. Mr. Smith, on the other hand, testified without contradiction that the machine is not operating during the loading phase. Moreover, Mr. Wulff did not state that the operator or any other employee was exposed to the unguarded belt and rotating

parts while the machine was in operation. Based upon the evidence, it is clear that the Secretary has failed to provide any evidence that employees are exposed to the unguarded moving parts while the machine is in operation. Therefore, Instance No. 1 of this item is vacated.

Instance 2, above, involves a Waterbury flat die thread roller # 10 located in the Secondary Room. From the evidence presented, there are two #10 machines; however, only one machine (machine #00012), was cited by the Secretary. That machine is depicted in the photograph marked Exh. C-7.[1] According to the Compliance Officer and Mr. Smith, the area marked by a circle on Exh. C-7 shows the nip point presented by moving parts of the machine. As clearly shown by the photograph, there is no guard protecting any employee working in close proximity to the nip point during the operation of the machine. The photograph also shows a hand brush placed in a tray approximately a foot from the rotating parts. According to the Compliance Officer, the operator uses the brush to remove metal chips. However, the Compliance Officer was unable to state that the machine was operating when the operator leaned over the machine to pick up the brush. Thus, there is no evidence that any employees are exposed to the moving parts while the machine is operating. Without that evidence, this item must be vacated.

Serious Citation No. 1, Item No. 9

> 29 CFR 1910.212(a)(3)(iii): Point(s) of operation of machinery were not guarded to prevent employee(s) from having any part of their body in the danger zone(s) during operating cycle(s):
>
> 1. SECONDARY ROOM: THE BLACK & WEBSTER STAKING MACHINES (SERIAL NUMBERS 15989, 50577 AND 15942) DID NOT HAVE POINT OF OPERATION GUARDS AROUND EACH SIDE OF THE ELECTROPUNCHES.
>
> 2. WELDING ROOM: THE UNUSED PORTION OF THE BLADE WAS NOT GUARDED ON THE JET EQUIPMENT & TOOLS HORIZONTAL VERTICAL BANDSAW (SERIAL NUMBER 103974037). THE CURRENT GUARD DOES NOT ADEQUATELY COVER THE BLADE.

---

[1] Respondent referred to Exh. C-21 during his examination of Graham Smith (Tr. 334-336). Exh C-21 is a photograph of the flat die thread roller #10, which was not cited by Complainant.

Instance 1

During his inspection, the Compliance Officer observed employee Victoria Vivarelli operating a punch press machine in the Secondary Room. The employee placed a zinc fastener at the point of operation and a molded plaster piece was inserted into the fastener by the machine (Tr. 84, 85). The machine was equipped with a guard which, when pressed, deactivated the machine (Exh. C-9, Tr. 85-87). Complainant asserts, however, that the guard is only a partial guard, and the employee can place her hands at the point of operation while the machine is operating without activating the shut off guard (Tr. 87, 89). The Compliance Officer also observed two other machines in the area which were similar to the machine used by the employee; however, he did not observe anyone operating those machines (Tr. 88). According to the Compliance Officer, the employee places the metal fastener into the machine by hand, activates the machine by a foot pedal and, after the operation is complete, removes the piece from the machine by hand (Tr. 90-91). The Compliance Officer testified that the hazard he observed; that is, the ability of the employee to place her fingers in the point of operation while the machine is operating, could be eliminated by extending the guard down to within a quarter to a half inch of the point of operation on all sides (Tr. 92). The Compliance Officer also testified that he has never seen this type of machine guarded in the manner which he suggested (Tr. 96). The Respondent, on the other hand, testified that the guard was placed on the machine by the manufacturer, and is called a "Protecto Switch". After the employee places the part into the machine and depresses the foot pedal, the guard comes down around the point of operation, preventing the employee from entering the point of operation with any body part without activating the shut off switch (Tr. 340-342). Moreover, the finished product is "blown out" of the machine by a jet of air (Tr. 342, 343). Thus, at no time may the employee place her fingers or hands in the point of operation while the machine is operating without activating the shut-off switch. This evidence is not rebutted in the record. Since the Secretary has failed to establish employee exposure, this item must be vacated.

Instance 2

In the Welding Room, the Compliance Officer observed a band saw which is used to cut half-inch pipe (Tr. 97). Although the Compliance Officer did not observe the saw in

operation (Tr. 96), he concluded that a five to six inch portion of the saw blade was exposed when the saw was in operation (Tr. 97). The Respondent's representative acknowledged that the operator of the saw could come in contact with the unguarded portion of the saw described above when the saw is being operated (Tr. 348). Upon being informed of the hazard by the Compliance Officer, Mr. Smith agreed to place a guard on the saw (Tr. 100) and, at the time of the hearing, a guard had been placed on the saw. Based upon the foregoing, it is concluded that this item should be affirmed as a Serious violation, and a penalty of $200 is assessed thereto.

Citation No. 1, Item No. 10

> 29 CFR 1910.212(a)(4): Revolving drum(s), barrel(s), or container(s) were not guarded by enclosure(s) which were interlocked with the drive mechanism so that the barrel(s), drum(s), or container(s) could not revolve unless the enclosure(s) were in place:
>
> IN THE FOLLOWING LOCATIONS, ROTATING TUMBLER UNITS WERE NOT GUARDED BY AN INTERLOCKED ENCLOSURE WHICH WOULD SHUT OFF THE DRIVE MECHANISM WHEN THE ENCLOSURE IS OPENED.
>
> 1. TUMBLING DEPARTMENT:
>
> A. TUMBLER IN THE MIDDLE ROOM NEXT TO THE LARGE HORIZONTAL TUMBLER.
>
> B. TUMBLER IN THE MIDDLE ROOM NEXT TO THE ENTRANCE TO THE OLD BATHROOM.
>
> C. THE TUMBLER IN THE REAR ROOM WITH THE LEYLAND FARADAY MOTOR.
>
> D. THE TUMBLER IN THE REAR ROOM WITH THE MASTER GEARHEAD MOTOR.
>
> 2. SHIPPING AND RECEIVING: THE STANDUP TUMBLER USED FOR WASHING PARTS.

This citation involves five tumbler machines at the worksite which are used for the same basic operation. The Tumbling Machine is basically an open-mouthed rotating barrel

used to "burnish" and break up rough cast parts (Tr. 349, Ex. C-13, 14 and 15). The employee operating the machine places materials in the barrel while it is stationary. A lid is placed over the mouth of the barrel and a timer on the machine is set for the period of time necessary to complete the "breaking" of the parts. The machine shuts off automatically when the time set on the timer expires (Tr. 349, 350). The employee presses the "on" button, activating the machine and the barrel rotates, in the Compliance Officer's opinion, "at a fast speed" (Tr. 111). Respondent, however, states that the barrel rotates "slowly" in order to "flip" the parts inside the barrel (Tr. 353). Respondent asserts that there is no employee exposure to the rotating barrel while the machine is running (Tr. 350, 351). According to the Respondent's witness, Mr. Smith, the operator is not required to be in close proximity to the machine while it is operating except to press the "on" button to activate the machine. At that point, the employee is approximately one and one half feet away from the rotating drum (Tr. 352).

Based upon the evidence, it is concluded that the Secretary has failed to establish sufficient employee exposure to the rotating parts of the tumbler machines while the machines are operating. The record reveals that the machines are not turned on and off at the same time (Tr. 404, 405). However, the operator, Mr. Pacheco, is not in close proximity to the rotating machines while loading or unloading a non-operating machine. Mr. Smith testified that the machines cannot be loaded or unloaded while they are operating (Tr. 349-350), nor is it necessary for the employee to monitor the machines while they are operating (Tr. 350). Since the operator is not in close proximity to the machines while they are rotating, it is not necessary to discuss the hazard, if any, presented to employees if they were required to be in close proximity to the barrels of the machines when they are rotating. For the foregoing reasons, this item and the penalty proposed thereto are vacated.

Serious Citation No. 1, Item No. 12

> 29 CFR 1910.219(d)(1): Pulley(s) with part(s) seven feet or less from the floor or work platform were not guarded in accordance with the requirements specified at 29 CFR 1910.219(m) & (o):
>
> IN THE FOLLOWING LOCATIONS, PULLEYS WERE NOT COMPLETELY ENCLOSED BY A GUARD:

1. TUMBLING DEPARTMENT: THE STANDUP TUMBLER IN THE MIDDLE ROOM NEXT TO THE ENTRANCE TO THE OLD BATHROOM HAD AN EXPOSED PULLEY THAT DRIVES THE INCLINED V-BELT.

2. SECONDARY ROOM:

   A. WATERBURY FLAT DIE ROLLER #20 MACHINE (NO. 0032) HAD AN EXPOSED PULLEY THAT DRIVES THE INCLINED FLAT BELT.

   B. WATERBURY FLAT DIE ROLLER #20 MACHINE (NO. 0028) HAD AN EXPOSED PULLEY THAT DRIVES THE INCLINED FLAT BELT.

   C. WATERBURY FLAT DIE ROLLER #10 MACHINE (NO. 00012) HAD AN EXPOSED PULLEY THAT DRIVES THE INCLINED FLAT BELT.

   D. WATERBURY FLAT DIE ROLLER #10 MACHINE (NO. 0025) HAD TWO EXPOSED PULLEYS, ONE THAT DRIVES THE INCLINED FLAT BELT, AND ONE THAT DRIVES THE INCLINED V-BELT.

Instance 1

During his inspection, the Compliance Officer observed a tumbling machine located in the Tumbling Department which was mechanically driven by a drive belt running over two wheels (Tr. 130, Ex. C-14, C-17). The belts and pulley were guarded by a solid metal guard (Ex. C-14); however, the side of the belt facing the machine was unguarded. The Compliance Officer testified that the operator of the machine was exposed to the unguarded portion of the drive belt when he turned the machine on (designated by "B" on Ex. C-14). The Respondent, however, testified that the operator was not exposed to the moving parts during the operation of the machine (Tr. 355). Moreover, the Compliance Officer testified that the operator came no closer than two feet of the pulley. Based upon the testimony of the witnesses, as well as an examination of Exhibits C-14 and C-17, it is clear that the operator of this machine is not exposed to the back side of the moving belt during the normal operation of the machine and, furthermore, the operator is protected from an

accidental contact with the moving parts by the guard over the pulley and belt. Accordingly, this item is vacated.

Instance 2

These alleged violations involve four Waterbury Flat Die Roller machines which had guards over the moving pulleys and belts (Tr. 154, Ex. C-18, C-19, C-20, C-21). At the hearing, the Compliance Officer was questioned whether there was employee exposure to the moving parts where, as in these instances, a guard was placed on those parts (Tr. 154-158). The Compliance Officer agreed that employee exposure was minimal at best. Based upon the testimony of the Compliance Officer, as well as the photographs of the machines, it is concluded that employee exposure to the moving parts is virtually non-existent (Tr. 370). For this reason, this item is vacated.

Serious Citation No. 1, Item 13(b)

> 29 CFR 1910.219(e)(3)(i): Vertical or inclined belt(s) were not enclosed by guard(s) conforming to the requirements specified at 29 CFR 1910.219(m) and (o):
>
> IN THE FOLLOWING LOCATIONS, INCLINED BELTS WERE NOT COMPLETELY ENCLOSED BY A GUARD:
>
> 1. TUMBLING DEPARTMENT: THE STANDUP TUMBLER IN THE MIDDLE ROOM NEXT TO THE ENTRANCE TO THE OLD BATHROOM HAD AN EXPOSED INCLINED V-BELT.
>
> 2. SECONDARY ROOM:
>
> 1. WATERBURY FLAT DIE ROLLER #20 (MACHINE #0032) HAS AN EXPOSED INCLINED FLAT BELT.
>
> 2. WATERBURY FLAT DIE ROLLER #20 (MACHINE #0028) HAS AN EXPOSED INCLINED FLAT BELT.
>
> 3. WATERBURY FLAT DIE ROLLER #10 (MACHINE #00012) HAS AN EXPOSED INCLINED FLAT BELT.
>
> 4. WATERBURY FLAT DIE ROLLER #10 (MACHINE #0025) HAS AN EXPOSED INCLINED FLAT BELT AND AN EXPOSED INCLINED V-BELT.

Item 13(b) relates to the same machinery and the identical alleged hazard cited at Item 12 of the citation. In other words, the Secretary has issued two citations for the same alleged hazardous condition. For the reasons stated in the discussion relating to Item 12 of the citation, it is concluded that there was no employee exposure to the moving parts cited by Complainant. Accordingly, this item and the penalty proposed thereto are vacated.

Serious Citation No. 1, Item No. 14

> 29 CFR 1910.219(f)(1): Gear(s) were not guarded by a complete enclosure or by one of the methods specified in 29 CFR 1910.219(f)(1)(ii) and (f)(1)(iii):
>
> IN THE FOLLOWING LOCATIONS, GEARS WERE NOT COMPLETELY ENCLOSED BY A GUARD:
>
> TUMBLING DEPARTMENT:
>
> 1. STANDUP TUMBLER IN THE MIDDLE ROOM NEXT TO LARGE HORIZONTAL TUMBLER.
>
> 2. STANDUP TUMBLER IN THE MIDDLE ROOM NEXT TO THE ENTRANCE TO THE OLD BATHROOM.

Serious Citation No. 1, Item No. 15

> 29 CFR 1910.219(f)(3): Sprocket wheels and chains which were seven feet or less above floors or platforms were not enclosed:
>
> IN THE FOLLOWING LOCATIONS, CHAINS AND SPROCKETS WERE NOT COMPLETELY ENCLOSED BY A GUARD:
>
> TUMBLING DEPARTMENT:
>
> 1. THE STANDUP TUMBLER IN THE REAR ROOM WITH THE LEYLAND FARADAY MOTOR.
>
> 2. THE STANDUP TUMBLER IN THE REAR ROOM WITH THE MASTER GEARHEAD MOTOR.

The machines which are the subject of Items 14 and 15 are the same machines cited under Item 10 of the citation. That item was vacated due to the lack of employee exposure to the rotating drums during the operation of the machine. Complainant is faced with the same difficulties regarding employee exposure for the gears and sprockets on these

machines. *See Page 12, supra.* The discussion regarding the lack of employee exposure for Item 10 of the citation is applicable here. *See also* Tr. 373, 375, 380, 381, 178, 192, 193, 195, 196. On direct examination, the Compliance Officer acknowledged that there was "minimal access" to the moving parts (Tr. 180, 195, 196). On the other hand, Respondent testified that there was no employee access to the chains and sprockets while the machines are in operation. For the foregoing reasons, Items 14 and 15 are vacated on the ground that employee exposure to the moving parts has not been established.

Serious Citation No. 1, Item 16(a) and 16(b):

> 29 CFR 1910.1200(e)(1): The employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met:
>
> ESTABLISHMENT: THE EMPLOYER DID NOT DEVELOP AND IMPLEMENT A WRITTEN HAZARD COMMUNICATION PROGRAM WHERE HAZARDOUS CHEMICALS AND MATERIALS ARE USED INCLUDING, BUT NOT LIMITED TO, ANTI-FREEZE, BIODYNE CLEANER, ACETYLENE AND ZINC.
>
> 29 CFR 1910.1200(e)(1)(i): The written hazard communication program did not include a list of the hazardous chemicals known to be present using an identity that was referenced on the appropriate material safety data sheet:
>
> ESTABLISHMENT: THE EMPLOYER DID NOT DEVELOP A COMPLETE CHEMICAL LIST OF ALL THE HAZARDOUS CHEMICALS AND MATERIALS WHICH THE EMPLOYEES USE.

Serious Citation No. 1, Item No. 17

> 29 CFR 1910.1200(g)(8): The employer did not maintain copies of the required material safety data sheets for each hazardous chemical in the workplace:
>
> ESTABLISHMENT: THE EMPLOYER DID NOT MAINTAIN A MATERIAL SAFETY DATA SHEET FOR EACH HAZARDOUS CHEMICAL OR MATERIAL EMPLOYEES USE INCLUDING, BUT NOT LIMITED TO; ACETYLENE, OXYGEN, WELDING WIRE, AND BIODYNE CLEANER.

Serious Citation No. 1, Item No. 18

29 CFR 1910.1200(h): Employees were not provided information and training as specified in 29 CFR 1910.1200(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area:

ESTABLISHMENT: EMPLOYEES WERE NOT PROVIDED WITH INFORMATION AND TRAINING ON THE HAZARDOUS CHEMICALS AND MATERIALS THAT ARE USED IN THEIR WORK AREA INCLUDING, BUT NOT LIMITED TO; ANTIFREEZE, BIODYNE CLEANER, ACETYLENE AND ZINC.

These items relate to alleged hazardous chemicals used by employees in the workplace and the requirement for establishing a hazard communication program, maintaining material safety data sheets and providing appropriate employee training when employees use, or are exposed to, hazardous chemicals. The Secretary alleges that Respondent's employees work with, or are exposed to, zinc, acetylene, biodyne cleaner, welding wire and antifreeze during their work activity and those materials are hazardous within the meaning of the cited regulations. Thus, Respondent must comply with the requirements of the standards listed above.

The Secretary must establish that the chemicals are present at the work site, and that they are hazardous with the meaning of 29 CFR 1910.1200(c) (a hazardous chemical is any chemical which is a physical hazard or a health hazard). The Respondent concedes that it did not have a hazardous communications program (Tr. 201, 385), and that antifreeze and biodyne cleaner were in the work area during the inspection (Tr. 385). Respondent asserts, however, that these chemicals were used in the same manner as "normal consumer use", and are exempt from the standard pursuant to 29 CFR 1910.1200(b)(6)(vii). The uncontroverted evidence establishes that the employer had less than a gallon of each chemical in the work area, and they were used infrequently and in the same manner as a normal consumer. Accordingly, it is concluded that the antifreeze and biodyne cleaner are exempt from the requirements of the standards set forth above.

Respondent also acknowledges that zinc is present in the work area and is heated to a melting temperature during production. Respondent testified that the temperature of the zinc never exceeds 780 degrees because the tensile strength of the metal is adversely affected above that temperature and controls are placed on the machine to prevent the temperature

from exceeding 780 degrees (Tr. 390). Respondent further testified that zinc does not produce fumes until it is heated to a temperature exceeding 1500 degrees (Tr. 387). Exhibit R-4, a material safety data sheet, lists the boiling point for zinc at 1665F; a condition which does not occur at Respondent's worksite. Although the Compliance Officer testified that employees are exposed to zinc fumes (Tr. 200), there is no evidence in the record supporting this conclusion. In the absence of evidence that zinc fumes are present at the work site, there is nothing in the record to support the conclusion that zinc, as a metal, is a hazardous chemical within the meaning of the standard.

The Compliance Officer also testified that acetylene and welding wire are hazardous chemicals, and are present at the worksite (Tr. 199). Respondent concedes that acetylene and welding wire are used by Graham Smith for small brazing jobs and small repairs (Tr. 387), and the acetylene is contained in a compressed tank (Tr. 389). Moreover, oxygen is used in conjunction with the acetylene during welding operations. The Respondent admits that it had no hazard communication program at all; therefore, it is concluded that Respondent failed to comply with the standards set forth above regarding acetylene and welding wires (Tr. 204). Accordingly, this item is affirmed as a Serious violation (Tr. 212) and, in consideration of the factors set forth at Section 17 (j) of the Act, a penalty in the amount of $200 is appropriate for each violation. A total penalty of $600 is, therefore, assessed for Items 16, 17 and 18 of the citation.

Serious Citation No. 1, Item No. 19

> 29 CFR 1910.37(q)(1): Exit(s) or access to exit(s) were not marked by readily visible signs:
>
> IN THE FOLLOWING LOCATIONS, DOORWAYS WERE NOT MARKED WITH EXIT SIGNS:
>
> 1. WELDING ROOM - EXIT TO THE REAR OF BUILDING.
>
> 2. DIE CASTING - EXIT LEADING FROM DIE CASTING DEPARTMENT IN TO THE WELDING ROOM.
>
> 3. SHIPPING AND RECEIVING - EXIT LEADING TO OUTSIDE.

4. TUMBLING DEPARTMENT: EXIT TO THE FRONT OF THE BUILDING.

During his inspection, the Compliance Officer observed four doorways which were not marked with exit signs as described in the citation. The Respondent acknowledged the requirement that the doorways must be marked as exits (Tr. 391). The evidence presented by the Secretary is not controverted in the record; thus, the violation is affirmed and a penalty, in consideration of the factors set forth at §17(j) of the Act, of $100 is assessed.

Findings of Fact and Conclusions of Law

All findings of fact relevant and necessary to a determination of the contested issues have been made above. *Fed. R. Civ. P. 52(a).* All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

Order

Serious Citation No. 1, Items 2(a) and 2(b), are affirmed as Other violations and a $300 penalty is assessed.

Serious Citation No. 1, Items 3(a) and 3(b), are affirmed as Other violations and no additional penalty is assessed.

Serious Citation No. 1, Item 4, is affirmed as a Serious violation and a penalty of $500 is assessed.

Serious Citation No. 1, Item 5, is affirmed as a Serious violation and a penalty of $450 is assessed.

Serious Citation No. 1, Item 6, is affirmed as a Serious violation and a penalty of $50 is assessed.

Serious Citation No. 1, Item 7, is affirmed as a Serious violation and a penalty of $50 is assessed.

Serious Citation No. 1, Item 8, is vacated.

Serious Citation No. 1, Item 9, Instance 1, is vacated.

Serious Citation No. 1, Item 9, Instance 2, is affirmed as a Serious violation and a penalty of $200 is assessed.

Serious Citation No. 1, Item 10, is vacated.

Serious Citation No. 1, Item 11 is affirmed and a penalty of $225 is assessed.

Serious Citation No. 1, Item 12, Instance 1 and 2, is vacated.

Serious Citation No. 1, Item 13(b), is vacated.

Serious Citation No. 1, Item 14, is vacated.

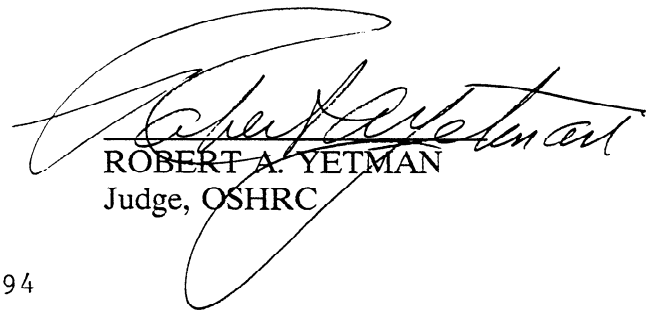
Serious Citation No. 1, Item 15, is vacated.

Serious Citation No. 1, Item 16, is affirmed as a Serious violation and a penalty of $200 is assessed.

Serious Citation No. 1, Item 17, is affirmed as a Serious violation and a penalty of $200 is assessed.

Serious Citation No. 1, Item 18, is affirmed and a penalty of $200 is assessed.

Serious Citation No. 1, Item No. 19, is affirmed and a penalty of $100 is assessed.



ROBERT A. YETMAN
Judge, OSHRC

DATED: September 30, 1994
BOSTON, MASSACHUSETTS