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

Secretary of Labor, Complainant, v. TMD Staffing, Respondent.	OSHRC Docket No.: 17-0560

Appearances:

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For Complainant

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For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

TMD Staffing (TMD) contests a two-item Citation and Notification of Penalty (Citation) issued March 20, 2017, by the Secretary. The Secretary issued the Citation following an inspection by the Occupational Safety and Health Administration (OSHA) on November 21, 2016, of a facility operated by Hightower Metal Works, in response to a report of a serious employee injury. The injured employee was one of several employees provided to Hightower Metal Works by TMD. After inspecting the facility, a compliance safety and health officer (CSHO) recommended issuing citations to both Hightower Metal Works and TMD for failing to provide guards for four machines used by TMD-supplied employees in Hightower Metal Work's facility, exposing the employees to struck-by and caught-by hazards.

Item 1 of the Citation alleges a serious violation of 29 C.F.R. § 1910.212(a)(1) for failing to provide a guard for the point of operation of a punch station on a Piranha P-90 ironworker machine. Item 2 alleges a serious violation of 29 C.F.R. § 1910.212(a)(3)(ii) for failing to provide guards for points of operation on two press brakes and a bending roll. The Secretary proposes a penalty of $12,675.00 for each item, for a total proposed penalty of $25,350.00.

The Court held a hearing in this matter on November 8, 2017, in Houston, Texas. The parties filed briefs on February 20, 2018. TMD argues the Secretary failed to establish its employees were exposed to struck-by or caught-by hazards when using the unguarded machines. TMD asserts the affirmative defense of unpreventable employee misconduct with respect to Instance (c) of Item 2. TMD also argues it lacked control of the worksite such that it could abate the alleged violative conditions.

For the reasons discussed below, the Court **AFFIRMS** Items 1 and 2 and assesses a total penalty of $20,000.00 for the two items.

JURISDICTION AND COVERAGE

TMD timely contested the Citation and Notification of Penalty on March 28, 2017. The parties stipulate the Commission has jurisdiction over this action and TMD is a covered business under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) (Tr. 16-17). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and TMD is a covered employer under § 3(5) of the Act.

BACKGROUND

Hightower Metal Works (HMW) owns and operates a steel fabrication facility in Houston, Texas. The company primarily serves the gas compression market. It has been in business for approximately 25 years and has hired workers supplied by TMD since it began operating. HMW directly employs five workers (including secretaries) and employs the remaining 10 or 11 workers through TMD (Tr. 29-31).

The TMD-supplied employees operate HMW's steel fabrication machines daily (Tr. 41, 50, 53). HMW operates its manufacturing shop five days a week, from 6:00 a.m. to 4:30 p.m. Depending on the workload, HMW may operate the shop a sixth day (Tr. 41).

On Saturday, October 29, 2016, TMD Employee #1 was operating HMW's Wysong bending roll (also referred to as the "plate roll" at the hearing), which is used to roll metal sheets into circular shapes. Employee #1 inserted a sheet of stainless steel between the rollers of the plate roll to make a pipe. The rolls caught his left glove and pulled his left index finger into the point of operation, crushing it. Emergency personnel transported Employee #1 to a hospital, where he received medical treatment. Later that week, medical personnel amputated his finger due to complications (Tr. 125-127). Employee #1 had worked at HMW's facility for 14 years at the time

of the hearing. He was on medical leave for two months and performed light duty at TMD's office for two weeks. He then returned to operating machines at HMW's shop (Tr. 124, 128).

CSHO Marcelo Maldonado inspected HMW's facility on November 21, 2016. After photographing the shop machines and conducting employee interviews, CSHO Maldonado recommended the Secretary issue citations to HMW, as the creating and controlling employer, and to TMD, as the exposing employer; the Secretary followed his recommendations. HMW entered into an informal settlement with the Secretary and abated the cited violations.

The four machines cited in this proceeding are:

(1) The Piranha P-90 ironworker, used to punch holes, cut flat bars and angle, and notch metal. HMW bought the ironworker four or five years before the November 2017 hearing. The punch station of the ironworker was not guarded at the time of the OSHA inspection. Following the inspection, HMW installed a Plexiglas guard on the punch station (Item 1) (Exh. C-1, pp. 7-8; Tr. 39, 50-54);

(2) The H.T.C. 160G press brake, used to bend sheets of metal. After placing a sheet of metal in the machine, the operator steps on a pedal to activate the machine. The H.T.C. press brake was already in the manufacturing shop when HMW bought the facility in 1992. It was not guarded at the time of the OSHA inspection. Subsequent to the inspection, HMW installed a light curtain guard on the press brake (Item 2, Instance (a)) (Exh. C-1, p. 5; Tr. 40-47);

(3) The Piranha 65 press brake, also used to bend sheets of metal. It is activated using a computer controller. HMW bought the Piranha press brake in 2005 or 2006. It was not guarded at the time of the OSHA inspection. HMW installed a light curtain guard after the inspection (Item 2, Instance (b)) (Exh. C-1, p. 6; Tr. 48-50); and

(4) The Wysong bending roll or plate roll, used to roll metal sheets into round shapes. The point of operation of the plate roll was not guarded, but a wire cable ran around the machine that would halt operation if the operator touched it. This is the machine on which Employee #1 was injured. HMW did not guard the point of operation of the plate roll after the OSHA inspection, but it placed a guardrail on the back of the machine to prevent employees accessing that area (Item 2, Instance (c)) (Exh. C-1, pp. 1-4; Tr. 33-40).[1]

[1] TMD asserts, "Hightower determined, with OSHA's acquiescence, that guarding of the Wysong plate roll was not even possible." (TMD's brief, p. 9) TMD bases this assertion on HMW president Mark Hightower's comment at the hearing that, during settlement talks with the Secretary, HMW "proved to [the Secretary] that there are no more guards

THE CITATION

The Secretary's Burden of Proof

To establish a violation, "the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 169 (1st Cir. 1982).

Item 1: Alleged Serious Violation of § 1910.212(a)(1)

Item 1 of the Citation alleges,

> On or about November 21, 2016, and at times prior thereto, employees in the manufacturing shop were exposed to struck-by and caught-by hazards when operating a punch station on a Piranha P-90 ironworker without a point of operation guard.[2]

Section 1910.212(a)(1) provides:

> 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.

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for it." (Tr. 40) To the extent TMD is arguing guarding the bending roll is infeasible, the argument fails. The employer has the burden of proving infeasibility.

> The Secretary . . . is not required to prove feasibility where the cited standard 'states the hazard to be protected against and the performance criterion by which the adequacy of the employer's abatement must be judged"; that is, where 'the performance required by the standard is clear enough.' *See Hughes Bros.*, 6 BNA OSHC 1830, 1835 (No. 12523, 1978) (contrasting circumstances, which involved citation under 29 C.F.R. § 1910.212(a)(3)(ii), to prior case in which Commission required Secretary to prove feasibility with respect to PPE standard that required "unspecified [PPE] against unspecified hazards"); *Consol. Aluminum Corp.*, 9 BNA OSHC 1144, 1156-57 (No. 77-1091, 1980) (extending rationale in *Hughes* to citation alleging violation of § 1910.212(a)(1) and concluding that Secretary did not bear burden of proving feasibility, because standard "states the hazards to be protected against and the performance required with sufficient clarity, particularly when read in the context of [§] 1910.212 as a whole").

Envision Waste Servs., LLC, 27 BNA OSHC 1001, 1003 (No. 12-1600, 2018). Infeasibility is an affirmative defense which respondent must raise in its answer. *See* Commission Rules 34(b)(3) and (4), 29 C.F.R. § 2200.34(b) and (4). TMD did not do so. It has waived assertion of the infeasibility defense.

[2] Employee #1's accident occurred October 29, 2017. The date referred to in the alleged violation descriptions for Items 1 and 2, November 21, 2017, is the date of the CSHO's inspection of HMW's facility. The Secretary has not sought to amend the Citation and TMD has not raised the issue of the discrepancy between the date of the injury that triggered the inspection and the date of the actual inspection. The Court determines the parties thoroughly litigated the issue of employee access to the point of operation of the bending roll and squarely recognized which events occurred on which dates. *See Envision Waste Services*, 27 BNA OSHC at 1007.

> Examples of guarding methods are-barrier guards, two-hand tripping devices, electronic safety devices, etc.

TMD argues the Secretary failed to establish its employees were exposed to struck-by or caught-by hazards created by the point of operation of the punch station. [3]

(1) The Cited Standard Applies

Section 1910.212(a)(1) is found in *Subpart O—Machinery and Machine Guarding* of the general industry standards. Section 1910.212 is captioned "General requirements for all machines." This standard applies to all machines not covered by a more specific standard. TMD does not dispute the applicability of the standard. The Piranha P-90 ironworker is a machine. Section 1910.212(a)(1) applies to the cited condition.

(2) Failure to Comply with § 1910.212(a)(1)

The punch station of the Piranha P-90 ironworker was not guarded (Exh. C-1, pp. 7-8). Mr. Hightower testified his company purchased the machine four or five years before the hearing, and the TMD employees operated it in its unguarded condition until after the November 21, 2016, OSHA inspection (Tr. 52-53).

The Secretary has established TMD failed to comply with § 1910.212(a)(1).

(3) Employees Had Access to the Violative Condition

"In order to establish a violation of section 1910.212(a)(1), the Secretary must first prove the existence of a hazard. . . . Whether a machine exposes an employee to a hazard must be determined based on the manner in which the machine functions and how it is operated by the employees." *Armour Food Co.*, 14 BNA OSHC 1817, 1821 (No. 86-247, 1990).

Mr. Hightower explained the manner in which the punch station of the Piranha P-90 ironworker functions and how it is operated.

> The actual punch of the machine is—you lay your piece of metal up there, you're bringing the punch down, and you're lining it up with the hydraulic foot pedal. It comes down slow, and you line that center punch up in the middle, you let go, and you punch it.

[3] The Secretary issued the Citation to TMD because the company is the exposing employer. There is "long-standing Commission precedent holding that an employer whose own employees are exposed to a hazard or violative condition—an 'exposing employer'—has a statutory duty to comply with a particular standard even where it did not create or control the hazard." *S. Pan* Servs. Co., 25 BNA OSHC 1081, 1085 (No. 08-0866, 2014). TMD does not dispute it is an exposing employer required to comply with the relevant OSHA standards in this proceeding.

(Tr. 135)

He stated it is dangerous for operators to place their hands in the zone of danger of the punch station. "You don't want to put your fingers in there. . . It's where it punches a hole. It would punch—you know, it would crush your hand." (Tr. 59). His testimony establishes operation of the punch station exposed its operators to a hazard.

> To establish access under Commission precedent, the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods*., 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, pp. 44,506-07 (No. 93-1853, 1997) (citing *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶20,448, p, 24,425 (No. 504, 1976)).

S & G Packaging Co., LLC, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001).

TMD's primary defense is the Secretary failed to establish its employees had access to the unguarded points of operation of the cited machines. The Court disagrees and finds the record establishes operators of the punch station on the Piranha P-90 were required to place their hands 2 to 3 inches from the point of operation, placing them within the zone of danger.

Employee #1 and Employee #2 of TMD testified at the hearing. Employee #1 stated he uses the punch station of the Piranha P-90 ironworker every day. He stands "[a]bout 2 feet" from the point of operation of the punch station when operating it (Tr. 129) Employee #2 likewise testified he operates the punch station daily, usually three or four times a day (Tr. 112). He stands "a foot and a half—2 feet away" from the point of operation when using the punch station (Tr. 113). The employee witnesses did not state how far their hands were from the point of operation as they operated the machine.

Mr. Hightower was the only witness who testified regarding the position of the operator's hands when operating the punch station.

> Q. Before you . . . do the actual punch, what do you do?
>
> Mr. Hightower: Let go of it and take your hands out.
>
> Q. How far away are your hands from the actual point of operation?
>
> Mr. Hightower: You're never underneath your point of operation. Your hands are always 2 or 3 inches away on the punch.

(Tr. 136)

TMD argues this case is similar to *Safeway #2555, & Its Successors*, 2005 WL 858056 (No. 03-1072, 2005), in which the Commission reversed the ALJ's decision affirming a violation of § 1910.212(a)(1). The Commission found the Secretary failed to establish respondent's employees had access to the points of operation of industrial bakery mixers. Of particular concern to the Commission was the fact the CSHO "took no measurements to determine the possibility or likelihood of exposure at Safeway. In fact, the bowl was not even in place on the M-802 mixer, and his inspection of the A-200 mixer was limited to the question regarding whether any employee operated it." *Id. at* *2. As in *Safeway*, the CSHO in this case took no measurements to ascertain the distance between the operator's hands and the point of operation of the punch station. The Secretary's case is not limited to the inspection of the CSHO, however. The undisputed testimony of Mr. Hightower establishes the operator's hands come within 2 or 3 inches of the unguarded point of operation. At this distance it is "more than theoretically possible" the hands of the machine's operators would be in the zone of danger.

> The Secretary need not show it was certain that employees would be in the zone of danger, but he must show that exposure was more than theoretically possible. *Fabricated Metal Prods., Inc*. 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *Phoenix Roofing*, 17 BNA OSHC at 1079; *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) (finding that it was "'reasonably predictable' that an employee would come into contact with the unguarded belt and pulley either while attempting to reposition the fan, or inadvertently while passing nearby"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

Calpine Corp., 27 BNA OSHC 1014, 1017 (No. 11-1734, 2018).

The Court finds the positioning of the punch station operator's hands 2 to 3 inches from the point of operation places them within the zone of danger. It is not sufficient HMW personnel instructed the TMD employees to "Let go and take your hands out of it" before activating the pedal. TMW cannot rely on training to protect employees from the hazards addressed in the machine guarding standard. The Commission has also long-recognized that OSHA's machine guarding standards were designed to protect employees from human error, such as "neglect, distraction, inattention or inadvertence of an operator. . . . The standard was designed to provide against such human weakness." *Slyter Chair, Inc*., 4 BNA OSHC 1110, 1112 (No. 1263, 1976). "This requirement implicitly recognizes that human characteristics such as skill, intelligence, carelessness, and fatigue, along with many other qualities play a part in an individual's job performance, and it avoids dependence on human conduct for safety." *B.C. Crocker*, 4 BNA OSHC 1775, 1777 (No. 4387, 1976). "It is clear from the examples provided [in § 1910.212(a)(1)] that

the method of machine guarding should not be predominantly dependent upon human behavior. The plain purposes of the standard are to avoid dependence upon human behavior and to provide a safe environment for employees in the machine area from the hazards created by the machine's operation." *Akron Brick & Block Co*., 3 BNA OSHC 1876, 1878 (No. 4859, 1976).

The Court finds TMD's employees were assigned to operate the punch station of the Piranha P-90 ironworker on a daily basis, which would bring their hands within the zone of danger posed by the unguarded point of operation. It was reasonably predictable TMD's employees would have access to the struck-by and caught-by hazards.

(4) Employer Knowledge

TMD conducts quarterly worksite evaluations for every TMD client (Tr. 240). Martha Gallegos worked for TMD for six years. The last four years she worked there, she was a senior staffing specialist (Tr. 80). One of her duties was conducting site inspections of workplaces to which TMD supplied employees. Ms. Gallegos would accompany a TMD branch manager as they inspected the site and complete paperwork as instructed by the branch manager (Tr. 83). As part of the inspection, Ms. Gallegos filled out a form titled *Quarterly Work Site Evaluation.* The form is a checklist for specific items listed under the topics of housekeeping, personal protective equipment, training, ergonomics, first aid, work practices, fire protection, material handling, tools, machinery, contact agents, pressure equipment, and accidental management information. The machinery section of the checklist provides:


MACHINERY
☑ Good working condition
☐ Appears to be well maintained
☐ Guarded at point of operation
☐ Operators properly trained

(Exh. C-6, p. 30)

Page 30 of Exhibit C-6 is a copy of TMD's *Quarterly Work Site Evaluation* for HMW, completed by Ms. Gallegos as instructed by a branch manager identified as Irma on the line for "Service Rep." (Her last name was not given at the hearing.) The date written by Ms. Gallegos

appears to be "4/14/16."[4] Of the four boxes, Ms. Gallegos checked only "Good working condition" for the machinery items. She did not check "Guarded at point of operation." (Tr. 87)[5]

The Secretary has established a prima facie case that TMD had actual knowledge the cited machines were not guarded.[6] TMD states it could not "be expected to know that the machines were not in compliance with the standards, given that Hightower, not TMD, is in the metal working business." (TMD's brief, p. 2) Ms. Gallegos testified she wrote on the form only what the branch manager told her to write. TMD did not train her to conduct worksite evaluations or provide her with training in machine guarding (Tr. 83-84).

Neither Irma nor any other branch manager testified. The record is, therefore, silent regarding the training and duties of branch managers relating to worksite evaluations and expertise on machine guarding. TMD failed to rebut the Secretary's documentary evidence of the branch manager's actual knowledge of the unguarded machines. "It is well established that when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party. *Graves v. United States*, 150 U.S. 118, 121 (1893). The Commission also has noted that when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case. *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1968, 2003). TMD provided no rebuttal to the Secretary's evidence TMD supervisors inspected HMW's worksite and observed the machines were not guarded.

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[4] Ms. Gallegos testified she worked the last four years of her tenure at TMD as a senior staffing specialist. Her last day of work for TMD was May 23, 2017 (Tr. 81). Therefore, any *Quarterly Work Site Evaluations* she completed would have been between 2013 and May 23, 2017.

[5] In small print below the machinery checklist, there is a parenthetical list ("(belts, pulleys, gears, shafts)") of points of operation that are not at issue in this proceeding. TMD makes no argument regarding this list. There is no evidence in the record HMW had machines in its shop with these kinds of points of operation. The branch manager did not direct Ms. Gallegos to write "N/A," for "Not Applicable," in this section, as she did for a following section under "Pressure Equipment." (Exh. C-6, p. 30) TMD used a different work site evaluation form in 2003. On one sheet completed July 23, 2003, for HMW's worksite, under the heading "Machine Operations and Guarding," the question "No work on unguarded machinery?" is checked as "satisfactory," (Exh. C-6, p. 23). The Court concludes the parenthetical list provides examples of points of operation and is not an exhaustive set of limitations as to the kinds of points of operation that can be considered. To find TMD is concerned about the listed points of operation but not about the points of operation of punches, press brakes, and bending rolls would be nonsensical.

[6] Even without the documentary evidence establishing actual knowledge, it is undisputed TMD made quarterly inspections of HMFW's machine shop, looking for safety hazards (Tr. 83). This is sufficient to establish constructive knowledge of the unguarded machinery.

The Secretary has established TMD had actual knowledge of the violative condition of the unguarded punch station of the Piranha P-90 ironworker.[7] TMD conducted quarterly inspections of HMW's worksite and specifically looked at the machines its employees operated to determine whether they were guarded. In 2016 (after the purchase date of the Piranha P-90 ironworker) the branch manager instructed Ms. Gallegos to omit checking the box for "Guarded at point of operation" for HMW's machines. The branch manager is a supervisory employee whose actual knowledge is imputed to TMD. *See W.G. Yates & Sons Construction Co., Inc. v. OSHRC,* 459 F.3d 604, 607 (5th Cir.2006) ("[W]hen a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge[,] actual or constructive [,] of non-complying conduct of a subordinate.").

The Secretary has established TMD had actual knowledge of the violative condition. TMD violated § 1910.212(a)(1).

Characterization of the Violation

The Secretary characterized the violation of § 1910.212(a)(1) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

As noted, Mr. Hightower testified it is dangerous for operators to place their hands in the zone of danger of the punch station because "it would crush your hand." (Tr. 59)

The Court determines the Secretary properly characterized the violation as serious.

Item 2: Alleged Serious Violation of § 1910.212(a)(3)(ii)

Item 2 of the Citation alleges,

> On or about November 21, 2016, and at times prior thereto;
>
> a. Employees in the manufacturing shop were exposed to struck-by and caught-by hazards when operating a H.T.C. 160G press brake without a point of operation guard.

[7] To the extent TMD could argue it was aware the machines were unguarded, but unaware its employees had access to the zones of danger on the machines, the Court finds the exercise of reasonable diligence required TMD to follow up on its actual knowledge. Having observed and documented the machines were not guarded, TMD was obligated to ensure its employee were not exposed to hazardous conditions. *See Wiley Organics, Inc. d/b/a Organic Tech.*, 17 BNA OSHC 1586, 1597 (No. 91-3275, 1996), *aff'd*, 124 F.3d 201 (6th Cir. 1997) ("An employer has a general obligation to inform itself of the hazards present at the worksite and cannot claim lack of knowledge resulting from its own failure to make use of the sources of information readily available to it.") (citations omitted).

b. Employees in the manufacturing shop were exposed to struck-by and caught-by hazards when operating a Piranha 65 Ton press brake without a point of operation guard.

c. Employees in the manufacturing shop were exposed to caught-by hazards when operating a Wysong bending roll without a point of operation guard.

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

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

TMD argues the Secretary failed to establish its employees were exposed to struck-by or caught-by hazards created by the points of operation of the press brakes and the press roll.

(1) The Cited Standard Applies

Section 1910.212(a)(3)(ii) is found in *Subpart O—Machinery and Machine Guarding* of the general industry standards. It is undisputed the cited the press brakes and press roll are machines. Section 1910.212(a)(3) applies to the cited conditions.

(2) Failure to Comply with § 1910.212(a)(3)(ii)

It is undisputed the two cited press brakes and the bending roll were not guarded (Exh. C-1, pp. 1-6; Tr. 33-50). TMD failed to comply with § 1910.212(a)(3)(ii).

(3) Employees Had Access to the Violative Condition

"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." *Fabricated Metal Prod., Inc.*, 18 BNA OSHC 1072, n.6 (No. 93-1853, 1997). Mr. Hightower testified the cited press brakes presented amputation hazards to the operators (Tr. 57). The injury to Employee #1 while operating the bending roll establishes use of the unguarded machine presents a hazard. The Secretary has proven the violation of § 1910.212(a)(3)(ii) with regard to the cited machines presents hazards.

Instances (a) and (b): H.T.C. 190G Press Brake and Piranha 65 Ton Press Brake

Operators use the press brakes to bend angles on metal. They operate the press brakes daily (Tr. 50). Regarding the H.T.C. press brake, Mr. Hightower explained, "[Y]ou lay out your

piece of metal to whatever you want, put the proper die in, lay it in there, and you bring it down and get on the line, and you push the pedal, and it breaks it." (Tr. 45) He stated operators stand in front of the H.T.C. press brake when positioning the metal. "They're pretty close when they're bringing [the die] down because they have to put it on the line. . . . A foot away . . . you, know, bending over looking at it." (Tr. 46) Mr. Hightower stated the Piranha press brake is operated in the same manner, except it is activated with a computer controller, rather than a pedal (Tr. 48).

TMD focuses on the placement of the operators' feet while operating the press brakes, in arguing its employees are guarded by distance. Although the operators stand approximately a foot from the press brakes, they must place their hands much closer to perform their assigned tasks. Referring to OSHA Instruction CPL 02-01-025, TMD states, "[W]hile OSHA recognizes guarding by distance, where applicable, requires only four inches of clearance to be safe, here the witnesses testified their normal practice was to maintain one to two feet of clearance in all cases." (TMD's brief, p. 13) The section of the OSHA Instruction cited by TMD provides:

> For the purpose of maintaining a "safe distance" as discussed in this instruction, **the operating employee and helping employee(s) must not approach closer than necessary and in no case, closer than 4 inches (10.16 centimeters) to the power press brake point of operation. The minimum safe distance of 4 inches (10.6 cm) shall be measured from the exterior point of contact of the power press brake die closest to an employee.**

Id. at ¶ D.7. (emphasis in original)

This argument misses the mark for two reasons. First, TMD ignores the previous language of the OSHA Instruction mandating safe distance guarding is allowed *only* in the event guarding is not feasible and it is limited to one-time only fabrication.

> 5. Because of constraints imposed by certain manufacturing or fabricating processes, safeguarding by maintaining a safe distance from the point of operation may be acceptable but **only** when safeguarding by physical barrier or physical devices **is not feasible**. "Safe distance" means the clearance between an employee (typically his or her fingers holding and supporting a piece part) and the power press brake point of operation.
>
> 6. Safeguarding by maintaining a "safe distance" is acceptable if:
>
> a. The employer demonstrates that physical barriers and physical devices are not feasible to guard the power press brake point of operation. Physical devices typically include: two hand controls, holdouts or restraints and presence sensors.
>
> b. The employer demonstrates that power press brake point of operation guarding by maintaining a safe distance is limited to one-time only fabrication of made-to-order or custom-made piece parts. Small quantity runs, typically performed in job

> shop or model shop establishments may be affected by this provision; high volume piece part rates of production will not. A "small quantity run" means fabrication of more than one of the same piece parts over a continuous timeframe of no more than four hours per month.

Id. (emphasis in original)

Here, guarding by physical devices is feasible, as demonstrated by HMW's subsequent guarding of the press brakes using light curtain guards (Tr. 47, 50).

Second, the OSHA Instruction states the *minimum* safe distance is 4 inches. Mr. Hightower testified credibly the operators' hands could be as close as 2 inches when positioning the metal. Mr. Hightower testified, "[W]hen you're using the press brake, you're going to have to have your hand right up under there until you get it on the line, and then you're going to move your hands and come on down." (Tr. 64) TMD's counsel asked Mr. Hightower how far the operator's hands are from the point of operation of the H.T.C. press brake when positioning the metal piece. He stated, "[A] *couple of inches*, 4 inches, when you're lining the line up. But your hand is still not in the pinch point." (Tr. 137) (emphasis added) The distance of the hands of the Piranha press brake operator from the point of operation is "[i]dentical" to that of the operator's hands from the H.T.C. press brake's point of operation" (Tr. 138)

As with Item 1, the Court finds a distance of 2 to 4 inches from the point of operation to be within the zone of danger of the two press brakes. The Secretary has established TMD's employees had access to the violative condition.

Instance (c)—Wysong Bending Roll

Mr. Hightower testified the bending roll is operated by placing the metal sheet between the machine's rollers. "You feed the material into the front, turn it on, and it rolls it." (Tr. 138) The operator stands "a foot or more" away from the front of the machine when it is activated (Tr. 138). TMD's employees operated the plate roll daily (Tr. 107, 127).

Employee #1 explained how his finger was pulled into the rollers of the machine.

> As I was operating the roller and I was putting in a piece of stainless steel to make a pipe, when I put it in, my glove—my left-hand glove slipped. As I was operating it, it caught my—it caught it, and I automatically stopped it, and it crushed my finger.

(Tr. 126)

Employee #2 was working next to Employee #1 at the time of the accident. He stated Employee #1 was rolling a metal sheet. "Looking at 2 and a half feet. Not that big. A little piece of stainless steel." (Tr. 106) TMD took a statement from Employee #1 as part of its *Accident/Injury*

Report. A TMD representative reported, "The material went slanted he wanted to fix and that is when this happened." (Exh. C-20, p. 6)

It is one of the responsibilities of the plate roll operator to insert the metal sheet correctly. In inserting the stainless steel, Employee #1 was performing an assigned duty. When he reached out to straighten the metal sheet, he was engaging in reasonably predictable behavior. *See Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) (finding that it was "'reasonably predictable' that an employee would come into contact with the unguarded belt and pulley either while attempting to reposition the fan, or inadvertently while passing nearby"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). The Secretary has established it was reasonably predictable by operational necessity that TMD's bending roll operators were in the zone of danger of the point of operation when operating the machine.

(4) Employer Knowledge

Page 30 of Exhibit C-6 is a copy of TMD's *Quarterly Work Site Evaluation*, completed in April of 2016 at the instruction of a TMD branch manager. As noted regarding Item 1, the box indicating HMW's machinery is guarded is not checked. The knowledge of TMD's branch manager is imputed to TMD. The Secretary has established TMD knew of the violative condition of the cited machines.

Unpreventable Employee Misconduct Defense

TMD contends the injury to the hand of Employee #1 was the result of his unpreventable misconduct. To establish that a violation was the result of unpreventable employee misconduct an employer is required to show that it: "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007).

The unpreventable employee misconduct defense applies in situations where the behavior of the employee, not the existence of a violative condition, is at issue. OSHA's machine guarding standards were designed to protect employees from common human errors such as "neglect, distraction, inattention or inadvertence of an operator[.]" *Slyter Chair, Inc.*, 4 OSHC BNA at 1112. Here, the violative conduct is the failure to guard the bending roll, not the inadvertent action of the employee.

TMD's reliance on the unpreventable employee misconduct defense regarding Employee #1 is misplaced. Even without the occurrence of his injury, the record establishes TMD employees routinely operated the bending roll while it was in noncompliance with § 1910.212(a)(3)(ii). "*See Boeing Co*., 5 BNA OSHC 2014, 2016 (No. 12879, 1977) (finding of a violation does not depend on the cause of the particular accident that led to the case); *Concrete Constr. Corp*., 4 BNA OSHC 1133, 1135 (No. 2490, 1976) ('The Act may be violated even though no injuries have occurred, and even though a particular instance of noncompliance was not the cause of injuries.'); *Kansas City Power & Light Co*., 10 BNA OSHC 1417, 1422 (No. 76-5255, 1982) ('Indeed, both the judge and Respondent improperly define the hazard at issue in terms of the asserted cause of the specific incident that led to injury . . . .')." *Calpine Corp,* 27 BNA OSHC at n. 6.

Neither TMD nor HMW installed guards on the cited machines. Neither company had a work rule designed to prevent employees from using unguarded machines; it follows the companies could not then adequately communicate such a rule or takes steps to discover its violation or enforce the nonexistent rule. TMD's unpreventable employee misconduct defense fails.

Lack of Control Defense

TMD cites *Central of Georgia Railroad Company v. OSHRC,* 576 F.2d 620 (5th Cir. 1978), in support of its argument it lacked control of the worksite. In *Central,* the Court of Appeals for the Fifth Circuit discussed the emergent multi-employer worksite defense as set out in *Anning-Johnson Co. v. OSHRC,* 516 F.2d 1081 (7th Cir. 1975). The Fifth Circuit stated,

> We regard the Commission's position at least in part as an allocation of burdens of proof. Under this allocation the Secretary must first make out a prima facie case; the burden then shifts to the employer to rebut this prima facie case; or if he does not do so, he may establish an affirmative defense by showing his own lack of control over the hazard, and according to the Commission his protection of the employees through alternative measures.

Central, 576 F.2d at 624.

TMD argues it lacked control over the hazard:

> TMD has no supervision on site at Hightower. TMD visited Hightower only two to four times per year for site inspections. Further, TMD left training of proper use of the iron worker, press brakes, and plate roll to Hightower. TMD had no contractual right to insist on changes being made to the machines. [TMD claims administrator] Donna Mitchell testified that documents in the record at C-6 constitute the only contract between TMD and Hightower Metal Works. Those documents do not give TMD any right to access or alter the machines at Hightower, nor do they include

> any contractual covenants that TMD could enforce to force Hightower to change its machines. Furthermore, Hightower, and not TMD, investigated guarding options and collaborated with OSHA to implement guards on the equipment at issue.

(TMD's brief, pp. 17-18)

The Court agrees with the facts set out in TMD's argument. TMD overlooks, however, the second step of the formulation of the defense: the exposing employer must protect its employees through alternative means.

"Under Commission precedent . . . the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Southern Pan Services Co*., 25 BNA OSHC at 1085. An employer whose own employees are exposed to a hazard or violative condition (an exposing employer) has a statutory duty to comply with a particular standard even where it did not create or control the hazard. *See Anning-Johnson Co*., 4 BNA OSHC 1193, 1198-99 (No. 3694, 1976) (consolidated) (holding that the exposure of a subcontractor's "employees to a condition that the employer knows or should have known to be hazardous, in light of the authority or 'control' it retains over its own employees, gives rise to a duty under section 5(a)(2) of the Act[.]"). Thus, even if TMD had no control over HMW's worksite, it still had an obligation to comply with the standard, either by requesting HMW to provide guards for the machines, or, if HMW refused the request, prohibiting its employees from operating the machines.

> [E]ach employer has primary responsibility for the safety of its own employees. Simply because a subcontractor cannot himself abate a violative condition does not mean it is powerless to protect its employees. It can, for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, *instruct its employees to avoid the area where the hazard exists* if this alternative is practical, or in some instances provide an alternative means of protection against the hazard.... In the absence of such actions, we will still hold each employer responsible for all violative conditions to which its employees have access.

Grossman Steel & Alum. Corp., 4 BNA OSHC 1185, 1189 (No. 12775, 1975) (emphasis added) "[S]uch a requirement is consistent with Commission precedent requiring an employer to detect and assess the hazards to which its employees may be exposed, even those it did not create." *Associated Underwater Servs*, 24 BNA OSHC 1248, 1251 (No. 07-1851, 2012).

As the Secretary points out, TMD could have included language in its contract with HMW requiring machines to be guarded. In its existing contract, TMD prohibits its employees from operating forklifts (Exh. C-6, p. 29; Tr. 217, 228-229).

In *Central*, on which TMD relies, the Fifth Circuit upholds the primacy of the Act over any contractual terms to which the employers agreed.

> [A]s the Commission has noted, an employer may not contract out of its statutory responsibilities under OSHA. *Anning-Johnson*, 4 OSHC at 1198 n. 8 (BNA), and cases cited therein. If an employer does contract with a third party to maintain safe conditions, it is to be presumed that the employer can enforce the contract. We are unimpressed by Central's arguments that it could not enforce the present contract. . . [I]t was Central's burden to show the unavailability of such means, and it has not met its burden to show lack of control.
>
> We stress that the Act, not the contract, is the source of Central's responsibilities. *See Frohlick Crane Service, Inc. v. OSHRC*, 521 F.2d 628, 631 (10th Cir. 1975). An employer may carry out its statutory duties through its own private arrangements with third parties, but if it does so and if those duties are neglected, it is up to the employer to show why he cannot enforce the arrangements he has made. If he cannot make this showing, he must take the consequences, and his further remedy lies against the private party with whom he has contracted and whose breach exposes the employer to liability.

Id. at 624–25.

The Court determines TMD's defense it lacked control over the worksite fails.

Characterization of the Violation

The Secretary characterized the instances of the violation of § 1910.212(a)(3)(ii) as serious. With regard to the cited press brakes, Mr. Hightower stated, "It wouldn't be a smushed finger there; it would be a cut-off finger. It would cut it off in the press brake." (Tr. 57) The injury to Employee #1 while operating the plate roll establishes the risk of serious physical harm of operating that unguarded machine. The violation of § 1910.212(a)(iii) is properly characterized as serious.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed,

duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc*., 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

TMD has approximately 1,000 employees (Tr. 180). CSHO Maldonado conceded he erred when he calculated TMW's history of violations—he factored in six citations resulting from three inspections in 2014 and 2015. The Secretary deleted these citations in a final settlement agreement (Exh. R-1, p. 3; Tr. 189-190). The Secretary states that, had the CSHO correctly calculated the TMW's history of violations, "the penalty would have been reduced by only ten percent" (Secretary's brief, p. 14). TMW had a written safety and health program and its employees received safety training (Exhs. C-9 & C-10). It is entitled to penalty reductions for history and good faith.

The gravity of the violations for Items 1 and 2 is high. Two employees were exposed on a daily basis to unguarded points of operation on four machines. The likelihood of injury if they were struck or caught by the points of operation was great. TMS took no precautions against such injuries.

Based on the factors of size, history, good faith, and gravity, the Court assesses a penalty of $10,000.00 each for Items 1 and 2.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED:**

1. Item 1 of Citation No. 1, alleging a serious violation of § 1910.212(a)(1), is **AFIRMED** and a penalty of $10,000.00 is assessed; and

2. Instances (a) and (b) and (c) of Item 2 of Citation No. 1, alleging a serious violation of § 1910.212(a)(3)(ii) are **AFFIRMED** and a penalty of $10,000.00 is assessed.

SO ORDERED

/s/

Date: June 20, 2018

Sharon D. Calhoun
Administrative Law Judge
Atlanta, Georgia